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TABLE OF CONTENTS

MYRES S. MCDOUGAL DISTINGUISHED LECTURE 2016
MASS MIGRATION, CULTURAL CONFLICT, AND THE FEAR OF TERRORISM: DILEMMAS OF THE DEMOCRATIC WEST

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I. INTRODUCTION: THE DEMOGRAPHICS OF MASS MIGRATION

There is no reason to believe that 2015 was the high-water mark of migration, documented and undocumented, from the lands of mass poverty to the wealthy and comparatively well-ordered countries of the West. In the next thirty-five years, tens of millions more people are likely to begin the trek to the West driven by the economic, social and political pathologies of the lands of their birth and pulled by visions of affluence and security. Some will seek entry invoking the right to be protected from persecution.[1] Others implicitly will invoke a moral right to build a better life for themselves and their families.[2] The world's population is headed

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1. U.N. High Comm'r for Refugees, Introductory Note to Convention and Protocol Relating to the Status of Refugees 3 (2010), http://www.unhcr.org/3b66c2aa10.pdf (An "Asylum seeker" is a person who has arrived at the border of a state or gained entry by whatever means and has applied for asylum under the 1951 Refugee Convention on the ground that he or she has a well-founded fear of persecution on account of race, religion, nationality, political belief or membership in a social group if they return to their country of origin. Technically a refugee is a person whose application for asylum has been successful, but in lay discourse the term is often applied to anyone who appears to have fled their country of origin either because of the stipulated fear of persecution or to avoid being caught in the cross fire of an armed conflict. The term is often applied as well to persons uprooted by a natural disaster which has put their lives at risk. Some national courts have stretched the concept still wider to embrace individuals fleeing fearsomely abusive spouses or families. Once a person has come within the jurisdiction of a state, the principle of "non-refoulment" precludes a state from expelling the person to a country, whether or not the country of origin, where he or she is at risk of torture or execution. While this principle is embodied in the 1951 Refugee Convention and its 1967 Protocol, it has evolved into a principle of customary law and so is binding on all countries.).

2. *Compare* CHRISTOPHER HEATH WELLMAN & PHILLIP COLE, DEBATING THE ETHICS OF IMMIGRATION: IS THERE A RIGHT TO EXCLUDE? 8–9 (Sept. 30, 2011). (The author's justification for debating the ethics of immigration largely in terms of theory rather than more instrumental considerations like economic impact: "It is the role of theory... to challenge 'common sense,'. And we can at least shift it out of the consciousness of those who engage in this debate at the theoretical level.... Theory is the use

toward 11 billion or more by the end of the century[3] in the absence of nuclear war or collision with a large asteroid or the discovery by nihilists of how to combine the lethality of Ebola with the contagiousness of the common cold. Less than twenty years ago, the conventional wisdom among demographers was that the world's population would peak in 2050 at 9 billion.[4] Now, according to United Nations (UN) reports, it is expected to hit almost 10 billion by mid-century and surpass 11 billion by 2100.[5]

The largest bulk of that growth will occur in Africa. Experts estimate that a population that has already grown 50 percent in the last fifteen years will by 2050 double from the present 1.25 billion to approximately 2.5 billion and continue to surge toward 4 billion by the century's end.[6] To convey a sense of what that means for individual countries, Nigeria's population alone is projected to leap from today's roughly 180 million to 500 million by mid-century[7] and the population in the risibly misnamed Democratic Republic of the Congo should expand from the current 75 million (an increase of 55 million since 1970) to 194 million.[8] Meanwhile, most of the rich countries will shrink absent large-scale immigration. Japan, to take an extreme case, with its 1.1 birthrate is projected to diminish from 120 million to less than 100 million by the middle of the century.[9] Italy, Spain, and Germany tag closely behind.[10]

In Asia, Pakistan's increasingly violent and dysfunctional society will likely add 50 million people just in the next fifteen years. Swelling numbers are also predicted for Afghanistan, from today's roughly 25 million to 55 million in 2050.[11]

Demographic pressure in the Middle East and North Africa present a

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of the imagination to construct possibilities, and we can only critically examine our beliefs if we are prepared to imagine other possibilities."), *with* CHANDRAN KUKATHAS, THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM (2003) (After conceding that a campaign for open borders is politically untenable, he goes on to encourage theorizing about and coming to recognize the case for it.).

3. U.N. Dep't. of Social and Economic Affairs, World Population Projected to Reach 9.7 billion by 2050 (Jul. 29, 2015), http://www.un.org/en/development/desa/news/population/2015-report.html (last visited Apr. 23, 2017); *see also* Rod Nordland, *A Migration Crisis, and It May Yet Get Worse*, N.Y. TIMES (Dec. 31, 2015), https://www.nytimes.com/2015/11/01/world/europe/a-mass-migration-crisis-and-it-may-yet-get-worse.html?_r=0 (last visited Apr. 23, 2017).

4. U.N. Dep't. of Social and Economic Affairs Population Div., *The World at Six Billion*, Introduction U.N. Doc. ESA/P/WP.154 (Oct. 12, 1999), http://www.un.org/esa/population/publications/sixbillion/sixbilpart1.pdf.

5. U.N. Dep't. of Social and Economic Affairs, *supra* note 3.

6. Ivana Kottasova, *Biggest populations in 2050: Move over Russia and Mexico. Here comes Africa*, CNN MONEY (Aug. 18, 2015), http://money.cnn.com/2015/08/18/news/countries-with-biggest-populations/.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Fertility Statistics*, Eurostat (Dec. 22, 2016), http://ec.europa.eu/eurostat/statistics-explained/pdfscache/1273.pdf.

11. U.N. Dep't of Econ. and Soc. Affairs, Population Div., *World Population Prospects: The 2015 Revision, Key Findings and Advance Tables,* ESA/P/WP.241 18 (2015), https://esa.un.org/unpd/wpp/Publications/Files/Key_Findings_WPP_2015.pdf.

particularly daunting picture for European political leaders concerned about managing immigration. In the second half of the twentieth Century, the population of the Middle East and North Africa increased fourfold, from about 93 to 347 million people.[12] Furthermore, that number is projected to double in the next thirty-five years, becoming roughly 680 million tightly packed persons by 2050.[13]

Powerful push factors beyond sheer numbers are at work in parts of the Global South. Anarchic violence, civil war, and persecution have already driven more than 60 million people from their traditional homes.[14] Some are displaced within national territories; others have fled across borders.[15]

Potentially dwarfing the numbers fleeing violence and persecution are the tens of millions of young people arriving at the door of the labor markets of developing countries, which seem incapable of bringing them into stable employment much less opportunities to prosper. In the Middle East and North Africa, 60 percent of the population is now under the age of twenty-five.[16] Less than 50 percent of people aged sixteen to thirty have regular employment and prospects for improvement in that figure are dim.[17] For many young job searchers, formal educational qualifications appear irrelevant: According to the World Bank, 30 percent of the unemployed in the Middle East and North Africa are university graduates, the victims of low quality education and a lack of relevant job skills, as well as insufficient private sector capital investment and persistent misgovernment.[18] Conditions in Sub-Saharan Africa, where many governments are hardly more than vertically integrated criminal conspiracies for the extraction of wealth from tortured societies, are just as grim or grimmer.[19]

The swelling migrant tide has fueled a political reaction which is proving much more toxic in Europe than in the United States. In this country, a coalition of liberals, big business, agricultural interests and members of earlier diaspora battle on the whole effectively in favor of continuing immigration on a scale calculated to bring the US population of almost 500 million by the middle of the century.[20] The issue of migration is more toxic in European politics in part because it has become entangled

12. Patrick Clawson, *Demography in the Middle East*, THE WASHINGTON INSTITUTE (Dec. 2009), http://www.washingtoninstitute.org/policy-analysis/view/demography-in-the-middle-east-population-growth-slowing-womens-situation-un.

13. *Id.*

14. Sam Jones, *One in every 113 people forced to flee, says UN refugee agency*, THE GUARDIAN (June 20, 2016), https://www.theguardian.com/global-development/2016/jun/20/one-in-every-113-people-uprooted-war-persecution-says-un-refugee-agency.

15. *Id.*

16. Middle East and North Africa: Youth Facts, YOUTH POLICY, http://www.youthpolicy.org/mappings/regionalyouthscenes/mena/facts/ (last visited Feb. 28 2017).

17. Lili Mottaghi, *The Problem of Unemployment in the Middle East and North Africa Explained in Three Charts*, THE WORLD BANK (Aug. 25, 2015), http://blogs.worldbank.org/arabvoices/problem-unemployment-middle-east-and-north-africa-explained-three-charts.

18. *Id.*

19. *See generally* SARAH CHAYES, THIEVES OF STATE: WHY CORRUPTION THREATENS GLOBAL SECURITY (2015).

20. UN Dep't. of Social and Economic Affairs, *supra* note 3.

in the politics of cultural conflict, inequality and economic stagnation.

II. MIGRATION AND CULTURAL CONFLICT

Cultural conflict in the United States is conducted largely among the long-settled inhabitants, most sharply between devout evangelicals and conservative Catholics, on the one hand, and social liberals and libertarians, on the other, between addicts of Fox News and consumers of the New York Times. Although traditionalists have not disappeared from West European countries,[21] for the past several decades social liberals have occupied the commanding heights of politics and culture. Nominally the faith of the great majority of West Europeans, Christian piety is more a background to contemporary society than an active presence. It does not aggressively combat the sunny hedonism of day-to-day life among the middle classes. To paraphrase Ronald Dworkin, Western Europe is a secular space where religion is more wallpaper than immediate presence.[22] The US is a religious country in which religious indifference is tolerated.[23]

Since World War II, a steady stream of Muslim immigrants has entered Continental Europe from Turkey, North, and to a lesser degree, West Africa. In the United Kingdom, the stream's headwaters are primarily in South Asia. Despite a very long history of Moslem-Christian conflict, the first wave of migrants from predominantly Muslim countries did not generate anxiety, in part because the migrants were needed to fill gaps in the labor force opened by the Post World War II economic boom, and in part because particularly in the continental countries governments assumed that the migrants were in essence guest workers who would return to their countries of origin when they were no longer needed.[24] This expectation proved false. Most migrants stayed, their families joined them, and, as usually occurs, the existence of diaspora communities encouraged and facilitated new waves of migration even after the post-war European economies lost their exuberance. Meanwhile, opportunities for the less skilled members of the indigenous population and a fortiori for the second and third generations of immigrant families have been eroding in the face of the economic transformations and disruptions resulting from globalization and technological change.

Three other developments have turned the growing presence of migrants, but particularly migrants who identify as Muslim, into a ferocious political issue. One is simply numbers: A growing Muslim presence has become increasingly manifest at the grassroots level of society as Muslims have sought space for public worship and burial according to Muslim traditions and legal authority to slaughter animals in accordance with Halal law.[25] A second development has been the perceptible

21. Adam Nossiter, *François Fillon Wins Center-Right Nomination for French Presidency*, N.Y. TIMES (Nov. 26, 2016), https://www.nytimes.com/2016/11/27/world/europe/francois-fillon-wins-center-right-nomination-for-french-presidency.html.

22. *See generally* Ronald Dworkin, RELIGION WITHOUT GOD (2013).

23. *Id.*

24. *Muslim Migration to Europe*, UNIVERSITY OF MINNESOTA (July 17, 2015), https://cla.umn.edu/ihrc/news-events/other/muslim-migration-europe.

25. James Meikle, *What exactly does the halal methods of animal slaughter involve?*, THE

alienation of many of the children and grandchildren of the first immigrant wave and their disproportionate presence in the prison population. The recent phenomenon of a limited number of young men and women, not all from poor families,[26] departing Europe to join ISIS has sharpened the perception of alienation.

Developments within the Muslim World have been a third factor generating Islamophobia in European politics. An aggressive, intolerant piety, hostile to the liberal norms which in Europe have displaced those of Christian traditionalism, has gained increasing traction among Muslim populations worldwide, but particularly in the Arab-speaking sub-world. Its affective power there is in part the result of the political and military failure of Arab nationalism, a secular ideology of integration and modernization which briefly captured the imagination of educated Arabs in the decades before and just after the Second World War. The deflation of Arab nationalism left a vacuum into which a species of Islamic thought analogous to Christian fundamentalism rushed in. But it has also gained powerful traction in non-Arab countries like Pakistan.[27]

Funded principally by Saudi oil wealth,[28] the spread of fundamentalist theology within Islam coincided with the demographic explosion I have already mentioned.[29] It coincided as well with a vast movement of people from the countryside into the region's cities[30] bringing with them patriarchal traditions to which fundamentalist Islam gave a theological legitimacy which could be wielded against the condescension of sophisticated urban elites.

The spread of fundamentalist piety also coincided, of course, with armed militancy spurred initially by the successful call for jihad against the Soviet occupiers of Afghanistan and then reinforced by the difficulties Arab and West Asian Governments have had in coping with the twin stresses of mushrooming population growth and rocketing urbanization. Also fueling militancy, has been the increasing militarized presence of the West in the Middle East and West Asia and its association with repressive governments unable to help their swollen populations enter the precincts of that lavish consumerism which the popular majority witness in the media and in the lives of a small upper class. It is not, therefore, surprising that the call for jihad against the "far enemy", as Osama Bin Laden described the

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GUARDIAN (May 8, 2014), https://www.theguardian.com/lifeandstyle/2014/may/08/what-does-halal-method-animal-slaughter-involve.

26. Heather Long, *Who's joining ISIS? It might surprise you...*, CNN MONEY (Dec. 15, 2015), http://money.cnn.com/2015/12/15/news/economy/isis-recruit-characteristics/.

27. Directorate-General for External Policies, *The Involvement of Salafism/Wahhabism in the Support and Supply of Arms to Rebel Groups Around the World*, at 5, AFET (June 2013), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/457137/EXPO-AFET_ET(2013)457137_EN.pdf.

28. *Id.* at 19; *see also* John Kemp, *Saudi Arabia's oil reserves: how big are they really?*, REUTERS (July 11, 2016), http://www.reuters.com/article/us-saudi-oil-kemp-idUSKCN0ZL1X6.

29. Muslim Migration to Europe, *supra* note 24.

30. Martin Hvidt, *Economic diversification in GCC countries: Past record and future trends*, LONDON SCH. OF ECON. AND POLITICAL SCI. (Jan. 2013), http://www.lse.ac.uk/middleEastCentre/kuwait/documents/Economic-diversification-in-the-GCC-countries.pdf.

West, found a sufficient number of receptive ears to bring mass casualty terrorism into the cities of Europe as well as the United States.

These developments have produced in European electorates a mental association of migration and militant anti-liberalism, an image fueling, paradoxically, the rise of right-wing nationalist parties, illiberal themselves, and driving the leaders of main-stream parties to repudiate what they call multi-culturalism.[31] That repudiation implies either a cultural test for prospective migrants or government-driven efforts at cultural assimilation of multi-generational migrant families or both.

Obviously, the association of Islam with anti-liberalism in Europe finds an echo in the United States, principally albeit not exclusively on the political right, even though the Muslim community in the United States is small,[32] for the most part prosperous,[33] and with few exceptions integrated, by any definition of the word, into economy and society.[34]

What makes European political developments exquisitely important to anyone anywhere committed, however casually, to the defense of human rights is the issues they raise first about the appropriate limits of liberal tolerance and majority power and, conversely, the rights of religious and ethnic minorities. Those are the issues I want to address all too briefly in this lecture and then discuss with you in the time your patience and Ved's authority will allow.

Before going any further, however, I need to define exactly what I mean by the words "Liberalism" and "fundamentalism" or "Traditionalism." First, "Liberalism." I use the term not narrowly as a reference to some fraction of the American electorate but rather in its larger philosophical meaning as a political and social order dedicated to enabling individuals to shape continuously a personal identity and life plan in light of their understanding of the meaning and value and possibilities of human existence, in other words a political and social order in which human beings are the architects of themselves. The Universal Declaration of Human Rights[35] and the International Covenant on Civil and Political Rights[36] are legal expressions of my conception of Liberalism.

A corollary of respect for human agency is toleration of different choices

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31. Clifford D. May, *The Trouble with Multiculturalism*, NAT'L REVIEW (June 21, 2012), http://www.nationalreview.com/article/303529/trouble-multiculturalism-clifford-d-may.

32. Besheer Mohamen, *A new estimate of the U.S. Muslim population*, PEW RESEARCH CENTER (Jan. 6, 2016), http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/.

33. *Muslim Americans: Middle Class and Mostly Mainstream*, PEW RESEARCH CENTER (May 22, 2007), http://www.pewresearch.org/2007/05/22/muslim-americans-middle-class-and-mostly-mainstream/.

34. *Id.*

35. Universal Declaration of Human Rights, art. 25, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

36. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf [hereinafter *ICCPR*].

people make, choices which may be implicit in their practices. But suppose their practices include active membership in communities which reject the premises of Liberalism and also include propagation of the traditionalist community's il-Liberal protocols through indoctrination of their children? Should those choices be tolerated by Liberals? Perhaps the answer to that question depends on whether one advocates Liberalism as a formula for the peaceful coexistence of people with different systems of belief. Liberalism does have that instrumental value. But Liberalism itself is a belief system, at least a conviction about the character of a good society and the nature of an admirable life. Therefore, Liberalism, like Fundamentalism, can be messianic particularly when it coincides with the conviction that the propagation of Liberal values will serve the interests of the United States.

Even more than Liberalism, Fundamentalism can be widely referential, its meaning varying with context. But I use it as a reference to cultures which idealize the organization of family life along patriarchal lines with women in a subordinate position insofar as legal rights, sexual freedom, family decisional power, and relations with the larger society are concerned. Arguably, typifying this mindset was the Egyptian Muslim Brotherhood's criticism of a proposed United Nations Commission on the Status of Women declaration condemning violence against women,[37] which included a statement of women's rights to choose their marriage partners, to work, to travel, and to use contraception without their husband's permission, and to take their husbands to court for marital rape.[38] In a memorandum commenting on the document, the Brotherhood stated: "This declaration, if ratified, would lead to the complete disintegration of society".[39] In response, a spokesperson for Egypt's National Council for Women condemned the Brotherhood's condemnation.[40]

The Traditionalist culture also incorporates the premise that identity is inherited and fixed rather than individually constructed, that virtue consists in adherence to inherited traditions, that internal challenges to received beliefs is heresy, abandonment of the faith is punishable apostasy akin to treason in secular societies, and external criticism or satire of its central figures or core beliefs is blasphemy and

37. *See Muslim Brotherhood Statement Denouncing UN Women Declaration for Violating sharia Principles*, IKHWANWEB (Mar. 14, 2013), http:www.ikhwanweb.com/article.php?id=30731; *see also The National Council for Women's Response to the Muslim Brotherhood's Statement on the Proposed Agreed Conclusions by the 57th Session of the Commission on the Status of Women on Violence Against Women*, THE NATIONAL COUNCIL FOR WOMEN (Mar. 15, 2013), http://www.ncwegypt.com/index.php/en/media-centre/ncw-news/147-ncw-s-stand-with-regards-to-the curent-events-and-issues/748-the-national-council-for women-s-response-to-the-moslem-brotherhood-statement-on-the-proposed-agreed-conclusions-by-the-57th-session-of-the-commission-on-the-status-of women-on-violence-against-women.

38. A/RES/48/104, Declaration on the Elimination of Violence against Women (Dec. 20, 1993), http://www.un.org/documents/ga/res/48/a48r104.htm.

39. *Id.*

40. Michelle Nichols, *Egypt's Islamists warn giving women some rights could destroy society*, REUTERS (Mar. 14, 2013), http://www.reuters.com/article/us-women-un-rights-idUSBRE92E03D20130315; *see also* The National Council for Women, *supra* note 37.

should be punishable.[41]

Liberal minorities present public policy challenges to a secular Liberal state in a host of areas: free speech, sexual and reproductive freedom, educational standards including educational content and length, the regulation of marriage, gender equality with respect to divorce and control of family property, and the treatment of children, including protection of children from arranged marriages.[42]

III. MIGRATION AND THE RIGHT TO CULTURAL PRESERVATION

I want you to consider three questions: The first is whether international human rights law prevents Western Governments from denying entry to migrants who profess fundamentalist values. The second is whether human rights law requires Western Governments to respect the practices of fundamentalist minorities already settled in their countries. The third is whether, even if traditionalist minorities are not legally protected, people who think they are supporters of human rights should at least tolerate the efforts of fundamentalists to live and perpetuate culturally distinctive lives.

The first question, that is whether governments can impose cultural tests on persons wishing to enter and settle, assumes that governments have a broad discretion to exclude those wishing to enter, indeed could if they wished (and if they withdrew from the Refugee Convention), ban migration altogether. The legal case for governmental power in this regard is powerful. The UN Charter is first and foremost a defender of existing states from any threat to their "territorial integrity and political independence."[43] As opponents of any right to migration have argued, what meaning can the political independence and territorial integrity of states have if people can wander across their borders at will and settle on their territory?[44] A heavily populated but militarily weak state could engulf its well-armed neighbor simply by lifting border controls.

The omission in the International Covenant on Civil and Political Rights of a right to enter[45] corresponding to the specifically enumerated right to leave[46] can therefore be seen as a corollary of the UN Charter's guarantee of state sovereignty.[47] State practice reinforces the argument grounded in authoritative texts.

The moral as distinguished from the legal case for a right to exclude is much

41. Kareem Elbayar, *Reclaiming Tradition: Islamic Law in a Modern World*, GEORGE WASHINGTON UNIV., http://www.iar-gwu.org/node/23.

42. Ben Hubbard, *A Saudi Morals Enforcer Called for a More Liberal Islam. Then the Death Threats Began.*, N.Y. TIMES (July 10, 2016), https://www.nytimes.com/2016/07/11/world/middleeast/saudi-arabia-islam-wahhabism-religious-police.html.

43. U.N. Charter, art. 2, ¶ 4.

44. Catherine Dauvergne, Challenges to sovereignty: migration laws for the 21st century, (UNHCR Working Paper No. 92, 2003), http://www.unhcr.org/3f2f69e74.pdf.

45. ICCPR, *supra* note 36.

46. *Id.*

47. *See generally* U.N. Charter.

less clear.[48] A moral right to enter could be seen as an emanation from the totality of Liberal values reflected in the various human rights treaties. Consider the Freedom of Association and Assembly.[49] What could be more basic than my right to share my home permanently with a person I met on my travels abroad or on the Internet? In the globally connected world of 2016, and with the already enormous migration of people from the lands of their birth, many citizens of every state are likely to have human connections, both intimate and professional, that cross national boundaries. So to say that the state has a largely unconstrained right to close its borders is to concede to the state the authority sharply to diminish my associational rights and, incidentally, to create great disparities among citizens in the enjoyment of that right: those citizens whose intimate connections are entirely local will enjoy the right fully while those whose connections are transnational will be vulnerable to whatever limits the state chooses to impose.

A moral right to enter need not rest only on emanations from specific rights. It may rest, perhaps even more securely, on the principles or deep normative premises seen to lie behind the various legal enumerations. Arguably, one such moral premise is that the state should not use violence against individuals whose actions do not threaten the rights of others. Many aspiring migrants to Europe have repeatedly demonstrated that only physical violence will stop them. Africans, for instance, have climbed high barbed wire fences and faced hails of rubber bullets trying to enter the Spanish enclave of Ceuta in North Africa.[50]

A second principle or normative premise which could support a right to enter is that no one should be denied the opportunity to lead a life with some opportunity for improvement and some measure of choice. When a person struggling from day-to-day in some Southern country's informal economy, a person like Mohamed Bouzazi, the Tunisian street vendor whose self-immolation ignited the Arab Spring, moves from his or her country of birth into a comparatively well-governed, capital-rich country in Europe or North America, he or she enters a new universe of opportunity and quotidian security. Where grotesque inequality in life chances stemming from the accident of birth in a poor country can be radically mitigated by no more than acquiescence in entry, can persons who believe in the moral equality of all people bar the gates? Barring entry of non-threatening migrants is an affirmative action denying people the chance to escape the prison of poverty and powerlessness where the accident of birth deposited them. It is a means of enforcing what Josef Carens calls a geographical caste system, "the modern equivalent to feudal privilege which was an inherited status that greatly enhanced one's life

48. WELLMAN, *supra* note 2.

49. The Rights to Freedom of Peaceful Assembly and Association and the Internet, ASS'N FOR PROGRESSIVE COMMUNICATIONS, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/166/98/PDF/G1016698.pdf?OpenElement; *see generally Special Rapporteur on the rights to freedom of peaceful assembly and of association*, UNHCR, http://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/SRFreedomAssemblyAssociationIndex.aspx (last visited Mar. 1, 2017).

50. *Spain: 400 migrants storm North African border fence*, FOX NEWS (Dec. 9, 2016), http://www.foxnews.com/world/2016/12/09/spain-400-migrants-storm-north-african-border-fence.html.

chances."[51]

Despite its considerable power, the moral argument for open borders is not decisive. There is a possible response also grounded in the Liberal values which inform the human rights texts, in particular the linked rights of self-determination, self-government, and, paradoxically, the Freedom of Association and Assembly.[52] In long-established states like those of North America and Western Europe, which have evolved organically and where a certain unifying national spirit prevails, people imagine themselves as forming an enduring political association with boundaries within which members share a history, a sense of comradeship, and sets of quotidian practices and understandings. From that association they derive an identity. Not their only identity but one of such power that, when necessary, they risk their lives for it.

Article 25 of the International Covenant on Civil and Political Rights declares the right of citizens "to take part in the conduct of public affairs, directly or through freely chosen representatives."[53] Taking part in public affairs through freely chosen representatives would be gaseous rhetoric if it were not construed to mean that majorities can decide issues of great moment.[54] Who can enter the country and on what conditions has long been such an issue.

That is one string to this argument's bow. Its second string is the plausible claim that the coherent management of public affairs is impossible without a fairly stable body politic. Issues need to be defined, proposals for their resolution tested, potential representatives identified and assessed. How can this be accomplished if millions of people unfamiliar with the society's problems and personalities, its resources and institutions and historical experiences, persons who may not even be able to read or speak its principal language, can pour into the body politic in an unending stream?

The political philosopher Michael Walzer has put the point in a slightly different way. The political order, he has argued, is the outcome of negotiation and struggle over time and in a determinate place, a struggle towards what he calls a "common standpoint of morality," a moral settlement.[55] Where the moral settlement not only sustains civic peace but is as well the source of individual freedom and the relatively equal application of the law, it can be defended in the name of Liberalism. So, if migration of a certain size or composition is reasonably calculated to undermine the settlement, then on this view the Liberal democratic society is entitled to restrain or condition it. Whether migration does or could have that effect is, of course, a judgment about which people continue to disagree furiously.

The triumph of Liberal values in each Western country is not decisive.[56] So,

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51. *Compare* CHANDRAN KUKATHAS, THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM 153–54 (2003), *with* JOSPEH H. CARENS, IMMIGRATION & CITIZENSHIP 131–35 (2002).

52. *Special Rapporteur on the rights to freedom of peaceful assembly and of association, supra* note 49.

53. ICCPR, *supra* note 36, art. 25(a).

54. *Id.*

55. Michael Walzer, *Response to Kukathas, in* IAN SHAPIRO AND WILL KYMLICKA, EDS., ETHNICITY AND GROUP RIGHTS (1997).

56. *See generally* James Taub, FOREIGN POLICY, https://foreignpolicy.com/author/james-traub/.

one could argue, defenders of those values have reason to resist an unqualified right to cross borders. If there is a largely unqualified right to enter, persons coming from societies where Liberal values have not prevailed might bring with them the dominant values of those societies and thus serve as reinforcements for Liberalism's enemies.

But do international human rights norms allow for discrimination among prospective migrants on the basis of a person's cultural values? Certainly, a case can be made that they bar discrimination on the basis of religion. But would a test intending to bar entry for persons who believe that women must be governed by men or express homophobic views constitute discrimination on the basis of religion? A government like that of the Netherlands which has introduced something like a cultural test[57] would argue that such views are not integral to any of the great faiths but can be found among certain believers in all of them. For instance, a virulent strain of homophobia exists in Christian majority countries like Uganda where radical American evangelists have encouraged the passage of vicious anti-gay laws.[58] In any event, people are denied entry not because of their religious identity but rather because certain of their practices or convictions threaten the rights of others.

But, even if we assume that states have a moral as well as legal right to limit entry, there remains the question of the legal and moral rights of traditionalist minorities who have already entered and settled. What legal protection do international human rights norms offer to minority communities in general and to il-Liberal minorities in particular? Article 18 of the International Covenant on Civil and Political Rights (Covenant) requires states "to have respect for the liberty of parents...to ensure the religious and moral education of their children in conformity with their own convictions."[59] However, it makes that liberty subject to "such limitations...as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[60] That limitation can cover a lot of ground. It could, for instance, be construed to give governments discretion to require private schools established by Islamic fundamentalists to teach: (1) the necessity of respect for members of other faiths and for agnostics and atheists, (2) the equality of men and women and their equal right to shape their individual lives and the life of their family, (3) the value of free speech including speech critical of religious beliefs, and (4) the right of every person to change his or her religious identity: In short, to teach things at odds with traditionalist culture.

Article 23 of the Covenant declares the family to be "the natural and fundamental group unit of society and entitled to protection by society and the state."[61] An emphasis on the family unit rather than the individual is promising from

57. *Dutch set immigrants culture test*, BBC (Dec. 22, 2005), http://news.bbc.co.uk/2/hi/europe/4551292.stm.

58. David Smith, *Why Africa is the most homophobic continent*, THE GUARDIAN (Feb. 22, 2014), https://www.theguardian.com/world/2014/feb/23/africa-homophobia-uganda-anti-gay-law.

59. ICCPR, *supra* note 36, art. 18(4).

60. *Id.* art. 18(3).

61. *Id.* art. 23(1).

the fundamentalist perspective. However, it turns out that the family being protected is not necessarily the fundamentalist's idea of a proper family model, for Article 23 also provides that "States Parties...shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution." In addition, it declares that "No marriage shall be entered into without the free and full consent of the intending spouses."[62] So much for arranged marriages—particularly of the very young.

Fundamentalists might also invoke Article 26 which obligates State Parties to "prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on the basis of 'political or other opinion.'"[63] They could contend that their views on the rights of women or on intimate same-sex relations are protected "opinions." The government, conversely, could invoke Article 26 since it requires governments to prevent discrimination on the basis of sex.[64] Only Article 27 addresses the minorities question directly,[65] but it can most reasonably be construed to reinforce the previous articles and to guarantee equal opportunity and treatment for ethnic and religious minorities in competition for jobs and access to education and other societal goods.

Putting aside the question of legal protection, what is the moral argument for toleration of traditionalist practices by secular Liberal governments? On both principled and prudential grounds strong multiculturalists like Chandran Kukathas urge us to reject the "what-should-be-tolerated" framing of the policy issue.[66] Kukathas urges Liberals to think instead of cultures as coming together in a position of equality of right to reproduce themselves. He concedes that probably would lead to an archipelago of cultural identities and social practices within the Liberal nation-state.[67]

Multiculturalists differ in the lengths to which they would push the idea of communal cultural autonomy. Kukathas would deny the Liberal state the right to override community practices and beliefs which offend Liberal sensibilities such as the patriarchal organization of the family, isolation of women, arranged marriages, and gendered differences in education. What he does insist on, however, is a state-protected right of exit from the community.[68]

The Canadian multiculturalist Will Kymlicka's formula is cultural autonomy for migrant communities up to the point where their practices violate basic human rights.[69] It leaves us with a serious line-drawing problem. Which human rights are basic? Can the government in the name of equal protection punish Sunni fundamentalist owners of restaurants who refuse to admit Shia Muslims, Christians,

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62. *Id.* art. 23(3).
63. *Id.* art. 26.
64. *Id.*
65. *Id.* art. 27.
66. KUKATHAS, *supra* note 2.
67. *Id.*
68. *Id.*
69. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 1–9 (1996).

Jews, and others who do not share their beliefs? Can it enforce rape law against a fundamentalist who did not have the consent of his wife for sexual intercourse? Can it insist in the name of protecting fundamental rights that all children attend public pre-schools where they will be taught Liberal values embedded in the constitution?

Michael Walzer, whom I mentioned earlier, enters the debate from a slightly different angle. What every successful society needs, he argues, is a "common standpoint of morality" but one defined in primarily political not cultural terms.[70] The common standpoint is a consensus about a just organization of society which means it defines the terms in which groups compete for social and economic goods—income, wealth, access to education, celebrity—and identifies the things they should share equally like impartial application of the law, equal access to public services, equal opportunity to work in the state bureaucracy, and protection from destitution. The consensus, in his words, "represents the gradual shaping of a common life—at least, a common political life."[71] "Religious differences and cultural pluralism," he adds, "are entirely compatible with this kind of common moral standpoint."[72]

IV. CULTURAL DIFFERENCE AND SUSTAINABLE DEMOCRACY

And so we arrive at the last question I want to put to you and to me as well, because I am not sure of the answer. Is a common moral standpoint necessary for a long-enduring democratic society?

Consider the United States. Can its electorate be said to enjoy a "common moral standpoint"? Where is the point of commonality between those who believe that abortion is largely a matter of choice and those who label it murder; that physically intimate same-sex relationships are sinful and those who believe that sexual relationships between consenting adults are entirely a matter of choice; that the state should protect all members of the society from destitution and those who believe that in most cases destitution is the result of personal failings and therefore its consequences should not be mitigated; between those who believe that all persons are created equal and those who believe in a racially-defined hierarchy of talent and character; between those who believe that atheists and agnostics are unfit for public office and those who believe that faith is irrelevant for assessing candidates?

Could it nevertheless be argued despite those polar differences in value there exists a "common moral standpoint" among the settled inhabitants of the United States? My reply is "maybe". It depends what we mean by a common moral standpoint. It could mean only a consensus about the justness of a society's constitutional arrangements, about, that is, the procedure by which it produces public policies rather than the policies themselves. And arguably there is commonality in this sense.

In order to achieve this common standpoint of morality, however, we had to fight a ferocious Civil War and as evidence recently presented to the United States

70. WELZER, *supra* note 55.

71. *Id.*

72. *Id.*

Supreme Court in connection with litigation over the Voting Rights Act implies,[73] the attribution of fundamental rights much less support for equal life chances for all citizens is not universal. Opinion polling supports my intuition that a considerable majority of the American people believes or at least thinks it believes that all citizens, whatever their color, ethnic background, or creed should have equal opportunities to improve the conditions of their lives and that all of us are entitled to the equal protection of the laws, to a fair trial, to privacy in our homes, to an extensive freedom of speech and conscience and expression of religious faith and a right to participate in the political process. Those shared beliefs could be said to constitute a common moral standpoint.

One thing that worries me these days is evidence of stress on that common standpoint. I am concerned particularly with the 25 percent of the population who continue to question the legitimacy of the Obama Presidency ostensibly on the grounds that he was probably born abroad.[74] Also concerning is recent polling data indicating that people who identify with either of the two major political parties are beginning not simply to disagree but literally to hate each other for the sheer fact of belonging to the other party as if their party affiliation were a proxy for moral degradation.[75] Additional grounds for concern are efforts to limit the right to vote.

Fortunately, there remains a majority of Americans committed to the idea of a common citizenship, a patriotic bond, which transcends differences about how to implement our common values.[76] And even more fortunately, tolerance of difference, all kinds of difference, is far greater among younger people.[77] And that gives us grounds for optimism, even after this terrible electoral season, that the Bill of Rights culture will endure.

What is the prospect for Liberal values in West European societies where on the whole economies are grinding more slowly and the pressure of migration from culturally more distinct countries is more intense? One source of hope is their economic need for large-scale migration in order to support the aging indigenous population. For instance, to maintain the current ratio of employed persons to retirees, Germany needs an annual intake of four-hundred-thousand working age people.[78] But the rise of right-wing parties and the signs of a kind of cultural panic like the local level banning from public beaches in France of women in body-covering garments[79] demonstrates to me that the economic argument is politically

73. *Shelby County v. Holder*, SCOTUSblog, http://www.scotusblog.com/case-files/cases/shelby-county-v-holder/ (listing all amici curiae briefs submitted to the Court regarding this case).

74. Edward L. Hudgins, *America's Particular Patriotism*, CATO INST. (July 3, 2000), https://www.cato.org/publications/commentary/americas-particular-patriotism.

75. Lynn Vavreck, *Younger Americans Are Less Patriotic. At Least, in Some Ways.*, N.Y. TIMES (July 4, 2014), https://www.nytimes.com/2014/07/05/upshot/younger-americans-are-less-patriotic-at-least-in-some-ways.html.

76. *Partisanship and Political Animosity*, PEW RESEARCH CENTER (June 22, 2016), http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/.

77. *Id.*

78. *Germany is not Shrinking*, DW (Feb. 4, 2017), http://www.dw.com/en/germany-is-not-shrinking/a-37415327.

79. Ben Quinn, *French police make woman remove clothing on Nice beach following burkini ban*,

weak.

In Europe, the state must summon the human and material resources to connect new arrivals with long-established residents[80] and with the supportive institutions of the state, not simply its repressive ones. I do not see how this can be done without the introduction of compulsory national service where young people in small units integrated by class and ethnicity and led by carefully-trained adults serve the common good while living together and establishing thereby networks which could last a lifetime. In addition, the state must establish catchment areas in North and West Africa where prospective migrants can be taught a European language and labor force skills. To finance such an effort, Europe will, among other things, need to redeploy much of the 70 billion a year in foreign assistance it currently sends to countries in the Global South other than the funds, now inadequate, needed to assist the millions of displaced persons in the Middle East and West Asia. European states must also, I believe, require and integrate pre-school socialization. At the same time it must avoid measures which evidence contempt for traditionalist communities like the laws banning signs of piety such as headscarves and it must demonstrate positive respect by helping to finance the construction of prayer spaces and community centers and revising textbooks to reflect and celebrate the historical and contemporaneous presence and contributions of migrant communities.

Can the European state undertake the respectful integration of Muslim immigrants in the face of the continuing threat of mass-casualty terrorism? One searches with difficulty to find grounds for optimism. As Lawrence Wright, one of our most empathetic and incisive writers about jihadi terrorism, concludes in his recent book *The Terror Years*, it is "common to suggest," he says,

> that dealing with the root causes of terrorism is the best and maybe the only way to bring it to an end, but there is very little evidence to support that notion. Poverty doesn't necessarily lead to acts of terror. Nor does tyranny, nor do wars, corruption, a lack of education or opportunity. [...] Not one of these factors by itself is sufficient to say that here at last is the reason that idealistic young people line up for the opportunity to behead their opponents or blow themselves up in a fruit market. But each of those factors is a tributary in a mighty river that floods the Middle East, a river that we can call Despair.[81]

I ask myself: can we in the West find the will, the understanding, and the capacity to help dam that river? All I get in the form of an answer is a large question mark. This is, no doubt, how Winston Churchill felt about Britain's prospects early in World War II. All we can do is what he did, namely to struggle forward toward an uncertain end.

THE GUARDIAN (Aug. 23, 2016), https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach.

80. *Belgium to require immigrants to sign up to 'European values'*, THE GUARDIAN (Apr. 1, 2016), https://www.theguardian.com/world/2016/apr/01/belgium-to-require-immigrants-to-sign-up-to-european-values.

81. LAWRENCE WRIGHT, THE TERROR YEARS: FROM AL-QAEDA TO THE ISLAMIC STATE 342 (2016).

MIGRANTS AND REFUGEES ARE ROUTINELY DENIED THE PROTECTION OF INTERNATIONAL HUMAN RIGHTS: WHAT DOES THE FUTURE HOLD?

VED P. NANDA*

I. INTRODUCTION

In a globalized world, it is no surprise that human mobility is on the rise. The number of international migrants[1] increased from approximately 173 million in 2000[2] to 214 million in 2010[3] and stood at 244 million in 2015.[4] This includes over 65 million forcibly displaced persons and more than 21 million refugees.[5] In addition, although not a focus of this comment, 10 million stateless people[6] and 40 million internally displaced persons[7] also suffer varying deprivations of human rights.

While more migrants and refugees are on the move, they increasingly suffer from serious violations of their basic human rights en route, at the borders, and in the countries of transit as well as destination countries. This article discusses the challenges migrants and refugees face as they seek protection and the several recent efforts to find solutions to their plight. In Part II, I review the nature, magnitude, and complexity of the current international movement of migrants and refugees. Part III

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1. There is no universal or legal definition of a migrant. In common usage, an international migrant is a person who is outside the state of which he or she is a national or citizen and if a stateless person, he or she is outside the state of birth or habitual residence.

2. U.N. Secretary-General, *Report of the Special Rapporteur on the human rights of migrants*, ¶ 8, U.N. Doc. A/71/40767 (July 20, 2016) [hereinafter *Special Rapporteur's July 20, 2016 Report*], http://www.ohchr.org/Documents/Issues/SRMigrants/DevelopingGlobalCompactOnMigration.pdf; U.N. Secretary-General, *In safety and dignity: addressing large movements of refugees and migrants*, ¶ 12, U.N. Doc. A/70/59 (Apr. 21, 2016), http://www.undocs.org/A/70/59.

3. U.N., Office of the High Commissioner for Human Rights [OHCHR], *Migration: a global governance issue* (Nov. 9, 2010), http://www.ohchr.org/EN/NewsEvents/Pages/MigrationGlobalGovernanceIssue.aspx.

4. G.A. Res. 71/1, ¶ 3 (Oct. 3, 2016) [hereinafter N.Y. Declaration], http://www.unhcr.org/en-us/57e39d987.

5. U.N. High Commissioner for Refugees [UNHCR], *Figures at a Glance* (2015), http://www.unhcr.org/en-us/figures-at-a-glance.html (I will often use the term migrants to include refugees. A refugee is officially defined under the 1951 Convention Relating to the Status of Refugees, *infra* note 180 and accompanying text).

6. *Id.*

7. UNHCR, *Internally Displaced People*, http://www.unhcr.org/en-us/internally-displaced-people.html.

discusses the challenges migrants face and recent efforts undertaken to protect their rights and find a more orderly, predictable, coordinated, and humane process to address these challenges, contrasted with the current unregulated and ad hoc approaches. Part IV presents the recent developments related to refugee admissions in the United States. Part V notes the applicable international law, including the international law of migrants and international refugee law. Part VI provides analysis, followed by conclusion in Part VII.

II. NATURE, MAGNITUDE, AND COMPLEXITY OF THE MIGRATION CRISIS

On September 19, 2016, the United Nations General Assembly aptly stated the reasons for voluntary movement and forced displacement:

> Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change...or other environmental factors. Many move, indeed, for a combination of these reasons.[8]

Among the major pull factors is that destination states need migrant labor.

The number of displaced persons is indeed staggering and has grown dramatically, partially due to the continuing Syrian conflict, and also because of ethnic and religious tensions in several countries including Afghanistan, Eritrea, Iraq, Libya, and Somalia. More than a million refugees (those who flee across international borders because of war, violence, and persecution) and migrants crossed the Mediterranean in 2015, seeking safety,[9] and the number of those who applied for asylum in Europe between July 2015 and May 2016, also stood at more than one million.[10]

The numbers of unaccompanied minors seeking asylum in Europe are on the rise, as well – 198,500 entered Europe between 2008 and 2015, and 48 percent arrived in 2015 alone.[11] UNICEF has stated in a recent report, *Hitting Rock Bottom: How 2016 Became the Worst Year for Syria's Children*, that Syria's children have suffered the most during their country's civil war, for, as, in 2016 at least 652 children were killed, 850 were recruited and used in the conflict; more than 1.7 million inside Syria are out of school, and nearly six million were dependent on humanitarian assistance.[12] The number of Syrian children living as refugees in Turkey, Lebanon, Jordan, Egypt, and Iraq is over 2.3 million.[13] The report adds,

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8. N.Y. Declaration, *supra* note 4, ¶ 1.

9. UNHCR, *Better Protecting Refugees in the EU and Globally*, at 2 (2016), http://www.refworld.org/docid/58385d4e4.html [hereinafter *Better Protecting Refugees*].

10. Phillip Connor & Jens Manuel Krogstad, *Key facts about the world's refugees* (PEW RESEARCH CENTER Oct. 5, 2016), http://www.pewresearch.org/fact-tank/2016/10/05/key-facts-about-the-worlds-refugees/.

11. *Id.*

12. UNICEF, *Hitting Rock Bottom: How 2016 Became the Worst Year for Syria's Children*, at 2 (March 2017), http://www.refworld.org/docid/58c6bdc24.html.

13. *Id.*

"[s]ince the beginning of the conflict in 2011, thousands of children crossed Syria's borders unaccompanied or separated from their families. The situation of more than 47,000 people stranded at the no man's land near Syria's southeastern border with Jordan continues to deteriorate."[14]

The number of migrant arrivals to Europe by sea has slowed, due to the increased border restrictions on refugee and migrant movements toward and within Europe in 2016, and Turkey's decision to end the irregular migration from Turkey to the European Union, as set out in the EU-Turkey statement of March 16, 2016.[15] Nevertheless, during the first 73 days of 2017, 19,653 migrants, including refugees, still arrived in Europe.[16]

The perilous journeys resulted in the deaths of 7,763 migrants worldwide in 2016, an increase of 27 percent compared to 2015 and 47 percent compared to 2014; 5,085 of them died in the Mediterranean Sea in 2016, an increase of 34 percent from 2015.[17] Despite increased search-and-rescue efforts, 788 migrants, including refugees, died during the first 71 days of 2017.[18]

The recognition of the variety of reasons for the movement of people mentioned above was in a resolution the General Assembly adopted on September 19, 2016, entitled the *New York Declaration for Refugees and Migrants* (Declaration);[19] this was the outcome document of the High-Level Plenary Meeting on addressing large movements of refugees and migrants. The Heads of State and Government and High Representatives had assembled to address this topic. Earlier, in March 2016, a regional process in the Asia-Pacific Region, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, had charted a comprehensive regional approach to managing migration flows and combating people smuggling and human trafficking.[20]

A day following the UN Summit, President Barack Obama opened the Leaders'

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14. *Id.*

15. European Commission Press Release 144/16, Council of the European Union, EU-Turkey statement (Mar. 18, 2016), http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

16. International Organization for Migration [IOM], *Mediterranean migrant arrivals reach 19,653, Deaths: 525*, MISSING MIGRANTS PROJECT (Mar. 14, 2017), https://missingmigrants.iom.int/mediterranean-migrant-arrivals-reach-19653-deaths-525 [hereinafter Missing Migrants].

17. *Migrant Deaths and Disappearances Worldwide: 2016 Analysis* (IOM Mar. 17, 2017), www.iom.int/news/migrant-deaths-and-disappearances-worldwide-2016-analysis.

18. Missing Migrants, *supra* note 16; *see, e.g.*, Declan Walsh, *Libyans Find Bodies of 74 Migrants on Coast*, N.Y. TIMES, Feb. 22, 2017, at A4 (from a shipwrecked inflatable raft boat found on the shore); Ben Hubbard & Shuaib Almosawa, *Somali Migrants' Trek Becomes Scene of Horror*, N.Y. TIMES, Mar. 18, 2017, at A7 (killed by firing from a military helicopter on their boat).

19. N.Y. Declaration, *supra* note 4.

20. Sixth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, *Co-Chairs' Statement* (Mar. 23, 2016), http://www.baliprocess.net/UserFiles/baliprocess/File/BPMC%20Co-chairs%20Ministerial%20Statement_with%20Bali%20Declaration%20attached%20-%2023%20March%202016_docx.pdf.

Summit on Refugees,[21] at which donors increased the financial contributions made earlier to the United Nations and other international humanitarian organizations by approximately $4.5 billion over the 2015 level.[22]

As part of the Declaration, the Member States reaffirmed that they would "fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders."[23] They added that their response would "demonstrate full respect for international law and international human rights law and, where applicable, international refugee law and international humanitarian law."[24]

Among other commitments, the world leaders stated that they would recognize and...address, in accordance with our obligations under international law, the special needs of all people in vulnerable situations who are traveling within large movements of refugees and migrants, including women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants.[25]

Member States also committed to take measures to improve the integration and inclusion of migrants and refugees, as appropriate, with particular reference to access to justice.[26] They also "committed to implementing border control procedures in conformity with applicable obligations under international law, including international human rights law and international refugee law."[27] In addition, they stated that they would "protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status," and, referring to Article 3(1) of the Convention on the Rights of the Child, they would "giv[e] primary consideration at all times to the best interest of the child."[28]

Member States plan to adopt a global compact for safe, orderly, and regular migration and present it at an inter-governmental conference to be held in 2018.[29] They also plan to develop a comprehensive refugee response framework through the process of state negotiations and based on the principles of international cooperation and on the sharing of the burdens and responsibilities of refugees more equitably,

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21. U.N. Summit for Refugees and Migrants 2016 (Sept. 19, 2016), http://refugeesmigrants.un.org/summit; U.S. Office of the Press Secretary, Fact Sheet on the Leaders' Summit on Refugees (Sept. 20, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/09/20/fact-sheet-leaders-summit-refugees.

22. *Id.*; *see also* Ved Nanda, *The world's refugee system is broken, and solutions are elusive*, THE DENVER POST (Sept. 29, 2016), http://www.denverpost.com/2016/09/29/the-worlds-refugee-system-is-broken-and-solutions-are-elusive/.

23. N.Y. Declaration, *supra* note 4, ¶ 5.

24. *Id.*

25. *Id.* ¶ 23.

26. *Id.* ¶ 39.

27. *Id.* ¶ 24.

28. *Id.* ¶ 32.

29. *Id.* at Annex II ¶¶ 1, 9.

and which will be elaborated by UNHCR.[30]

Along with these undertakings, the Declaration includes many more commitments by Member States. Human Rights groups have been critical of the Declaration, as will be evaluated later in this article. It should, however, be noted here that notwithstanding these glowing promises, state practices do not match those commitments.

III. CHALLENGES OF MIGRATION AND RECENT EFFORTS TO PROTECT MIGRANTS' HUMAN RIGHTS

Migrants increasingly face restrictive immigration policies by states, such as restricting the inflow of migrants and "push-backs" at land and sea as border control measures, interception practices, detention, and even deportation. Two recent examples are the detention law in Hungary and deportation law in Belgium. On March 7, 2017, the Hungarian Parliament adopted a new law calling for mandatory detention of all asylum seekers, including children, for the entire length of the asylum procedure.[31] In a press briefing, the UNHCR spokesperson expressed deep concern that the asylum seekers "will be detained in shipping containers surrounded by high razor wire fence at the border for extended periods of time."[32] It should be noted that Hungary had already enacted legislative and policy obstacles in addition to the physical barriers it had erected, which had made it nearly impossible for asylum seekers to enter the country and apply for asylum. The spokesperson reminded Hungary that there are only a limited number of grounds to justify detention of refugees and asylum seekers and it must be "necessary, reasonable and proportionate" to do so. She reminded Hungary that failure to consider alternatives to detention could render detention arbitrary. Children, she said, should never be detained, for detention is never in a child's best interest.[33]

Under the law passed by Belgium's Parliament, the government is given extraordinary powers to deport legal residents of foreign origin, of whom there are about 1.3 million;[34] however, the law excludes Belgian nationals and refugees. Under the law, foreigners legally resident in Belgium could be deported on the mere suspicion of engaging in terrorist activities, or for "presenting a risk to public order or national security." Such action may be taken without a criminal conviction or even involving a judge. Several human rights groups protested this new law in a letter and the Belgian Human Rights League is planning to appeal. The fear of terrorism has already led several European countries – Hungary, Austria, and The Netherlands – to lower their threshold for deportation in recent years.[35]

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30. *Id.* at Annex I.

31. *UNHCR deeply concerned by Hungary plans to detain all asylum seekers*, UNHCR (Mar. 7, 2017), http://www.unhcr.org/news/briefing/2017/3/58be80454/unhcr-deeply-concerned-hungary-plans-detain-asylum-seekers.html.

32. *Id.*

33. *Id.*

34. Milan Schreuer, *Rights Groups See Red Flag in Belgian Deportation Law*, N.Y. TIMES, Mar. 12, 2017, at A9.

35. *Id.*

The Special Rapporteur on the Human Rights of Migrants has described the migrants' plight in his report of July 26, 2016: "Unregulated migration in host countries has led to rising anti-migration sentiment, discrimination and violence, as migrants are portrayed as 'stealing' jobs and draining social services."[36] He notes that the rise of nationalist populist parties and the tragic terrorist attacks around the world, xenophobia and hate speech have increased, creating a significant trend in the negative perceptions of migrants, as well creating a stumbling block in the development of more efficient evidence-based and human rights-based policies.[37]

The Special Rapporteur asserts that these negative perceptions persist notwithstanding immigrants' positive overall impact on employment generation and investment.[38] Referring to an OECD study[39] and another study by the OHCHR,[40] he states that migrants contribute to economic growth in the places they go and they contribute more in direct and indirect taxes than they take out.[41]

Migrants facing special challenges are those considered "irregular" migrants[42] and migrants in a vulnerable situation; children, especially those unaccompanied or separate from their families; and women and girls migrant workers. Although there is no universally accepted definition of the term, "irregular migrants," it usually refers "to the movement of international migrants who enter or stay in a country without correct authorization."[43] They are also usually described as "undocumented," "unauthorized," "unlawful," and even "illegal."[44]

According to the Global Migration Group, which is composed of 21 UN and other international entities working on migration, an "irregular migrant" is "every person who, owing to undocumented entry or the expiry or his or her visa, lacks legal status in a transit in a host country. The term applies to migrants who infringe a country's admission rules and any other person not authorized to remain in the host country."[45]

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36. *Special Rapporteur's July 20, 2016 Report*, *supra* note 2, ¶ 18.

37. *Id.*

38. *Id.* ¶ 19.

39. OECD, INTERNATIONAL MIGRATION OUTLOOK 2013 (OECD, 2013), http://www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2013_migr_outlook-2013-en. *See also* OECD, INTERNATIONAL MIGRATION OUTLOOK 2016 (OECD, 2016), http://www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2016_migr_outlook-2016-en (analyzing the economic impact of migration and how the OECD countries should respond).

40. OFFICE OF THE HIGH COMM'R OF HUMAN RIGHTS, THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF MIGRANTS IN AN IRREGULAR SITUATION, at 4, U.N. Sales No. E.14.XIV.4 (2014), http://www.OHCHR.org/documents/Publications/HR-PUB-14-1_en.pdf [hereinafter 2014 OHCHR Report].

41. *Special Rapporteur's July 20, 2016 Report*, *supra* note 2, ¶ 19.

42. 2014 OHCHR Report, *supra* note 40, at 4.

43. *Id.*

44. *Id.*

45. Glob. Migration Grp., *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*, at 7 (Oct. 2008), http://www.globalmigrationgroup.org/system/files/uploads/documents/Int_Migration_Human_Rights.pdf.

In the latest draft, in February 2017, OHCHR and the Global Migration Group provided a set of principles and guidelines on the human rights protection of migrants in vulnerable situations.[46] They state that the concept of a "migrant in a vulnerable situation" is to be understood as a range of the following intersecting factors which can exist simultaneously: a vulnerable situation arising from the reasons for leaving countries of origin; occurring in the context of the circumstances migrants encounter en route, at borders, and at reception; or related to a specific aspect of a person's identity or circumstance.[47]

It was no surprise that the rise in migration numbers led to greater national, regional, and international attention. International entities have, however, been actively involved with international migration issues for several decades. These include the United Nations and its various agencies, especially the Office of the UN High Commissioner for Human Rights,[48] the Special Rapporteur on the Human Rights of Migrants,[49] and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families.[50] Two special initiatives by the UN are the Global Forum on Migration and Development, a "voluntary, informal, non-binding and government-led process open to all States Members and Observers of the United Nations, to advance understanding and cooperation on the mutually reinforcing relationship between migration and development and to foster practical and action-oriented outcomes,"[51] and the Global Migration Group, an UN inter-agency group currently comprising 21 entities, which was established by the Secretary-General in 2006, and which promotes the wider application of all pertinent norms relating to migration and encourages "the adoption of more coherent, comprehensive and better coordinated approaches to the issue of international migration."[52] Other organizations include the International Organization for Migration, which has now become a related organization to the United Nations,[53] and the Organization for Economic Cooperation and Development.[54]

The major refugee organization is the United Nations Office of the High

46. Office of the High Comm'r of Human Rights & Glob. Migration Grp., *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, Draft (Feb. 2017), http://www.ohchr.org/EN/Issues/Migration/Pages/Draftsforcomments.aspx.

47. *Id.* at 4–5.

48. U.N., Office of the High Comm'n for Human Rights, http://www.ohchr.org/EN/Pages/WelcomePage.aspx (last visited Apr. 23, 2017).

49. U.N., Office of the U.N. High Comm'r for Human Rights, Special Rapporteur on the Human Rights of Migrants, http://www2.ohchr.org/english/issues/migration/rapporteur (last visited Apr. 23, 2017).

50. U.N., Office of the U.N. High Comm'r for Human Rights, Comm. on Migrant Workers, http://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx.

51. Glob. Forum on Migration and Dev., *Background and Objectives*, http://gfmd.org/process/background.

52. U.N., Glob. Migration Grp., http://www.globalmigrationgroup.org/.

53. INT'L ORG. ON MIGRATION, http://www.iom.int; Int'l Org. on Migration, IOM Becomes a Related Organization to the UN (Jul. 25, 2016), https://www.iom.int/news/iom-becomes-related-organization-un.

54. ORG. FOR ECON. COOPERATION AND DEV. [OECD], http://www.oecd.org.

Commissioner for Refugees (UNHCR), the UN Refugee Agency "dedicated to saving lives, protecting rights and building a better future for refugees, forcibly displaced communities and stateless people."[55] Among the non-governmental organizations in the United States on migration, major actors include the Migration Policy Institute,[56] and the Population Reference Bureau.[57] The International Rescue Committee,[58] U.S. Committee for Refugees,[59] Refugee Council USA,[60] and Refugees International[61] are among the major US NGOs active on refugee issues.

In 2015, European countries struggled to cope with the influx of migrants. Furious efforts were made to stem the tide of migrants entering Europe. These include the Valletta (Malta) Summit on Migration in November 2015,[62] which brought together European and African heads of state and government and was designed to build upon the earlier successes of the Rabat and Khartoum processes on migration, and the EU-Africa Dialogue on Migration and Mobility so as to address the new challenges of migration and to strengthen cooperation. The outcome was a Political Declaration[63] and a Plan of Action.[64] After committing "to respond decisively and together manage migration flows...guided by the principles of solidarity, partnership and shared responsibility," to respect international obligations and human rights, to make joint efforts against irregular migration, and for "preventing and fighting migrant smuggling, [and] eradicating trafficking in human beings,"[65] the participants agreed an Action Plan with five identified priority areas:

1. Development benefits of migration and addressing root causes of irregular migration and forced displacement;

2. Legal migration and mobility;

3. Protection and asylum;

4. Prevention of and fight against irregular migration, migrant smuggling and trafficking in human beings; and

5. Return, readmission and reintegration.[66]

To ensure implementation of the Plan, the participants agreed to launch 16 ambitious initiatives, several under each priority area, by the end of 2016.[67]

In March 2016, European leaders entered into an agreement with Turkey, under

55. U.N. Office of the High Comm'r for Refugees, *About*, http://www.unhcr.org/en-us/about-us.html.

56. MIGRATION POLICY INST., http://www.migrationpolicy.org.

57. POPULATION REFERENCE BUREAU, http://www.prb.org.

58. INT'L RESCUE COMM., https://www.rescue.org/topic/refugees-america.

59. U.S. COMM. FOR REFUGEES, http://refugees.org.

60. REFUGEE COUNCIL USA, http://www.rcusa.org/.

61. REFUGEES INT'L, https://www.refugeesinternational.org.

62. VALLETTA SUMMIT ON MIGRATION, www.consilium.europa.eu/en/meetings/international-summit/2015/11/11-12/.

63. Valletta Summit on Migration, *Political Declaration* (Nov. 11-12, 2015).

64. Valletta Summit on Migration, *Action Plan* (Nov. 11-12, 2015).

65. Valletta Summit, *supra* note 63, at 1, 3.

66. Valletta Summit *Action Plan*, *supra* note 64.

67. *Id.* at 1.

which Turkey will accept the return of all migrants crossing from Turkey to Greece who do not need international protection and all irregular migrants intercepted in Turkish waters.[68] The EU agreed to provide financial assistance to Turkey as part of the deal. Both countries also agreed to strengthen measures against migrant smugglers.[69] The accord sharply reduced crossings into Greece.

As the EU-Turkey agreement was considered a great success, the EU introduced in 2016 a New Migration Partnership Framework (MPF) aimed at fully integrating migration in the its foreign policy, with the stated objective of "saving lives and breaking the business model of smugglers, preventing illegal migration and enhanc[ing] cooperation on returns and readmission of irregular migrants, as well as stepping up investments in partner countries."[70] Long-term measures of the New MPF include addressing the root causes of irregular migration and forced displacement by supporting partner countries' political, social and economic development, and improving opportunities for sustainable development.[71] To implement it, the EU and member countries would strengthen the existing EU Emergency Trust Fund for Africa and provide eight billion euros over the period 2016-2020.[72]

Nearly four months after the launching of the MPF, the Commission presented the first progress report, stating that "the collective work is starting to bear fruit and is resulting in tangible outcomes."[73] The first group of countries in Africa part of this partnership were Ethiopia, Mali, Niger, Nigeria, and Senegal, and Jordan and Lebanon in the Near East.[74] Similar cooperation agreements are likely to follow with other countries.

Subsequently, EU heads of state or government met on February 3, 2017,[75] and agreed on measures aimed at reducing the flow of irregular migrants from Libya to Italy, whose numbers had reached 181,000 in 2016.[76] The outcome of the meeting, the Malta Declaration,[77] states that "[a] key element of a sustainable migration policy is to ensure effective control of our external border and stem illegal flows into the EU."[78] It further states that "[t]he Partnership Framework and the Valletta Action

68. European Council Press Release 144/16, EU-Turkey statement (Mar. 18, 2016), http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

69. *Id.*

70. European Comm'n, *Migration Partnership Framework: A New Approach to Better Manage Migration* (June 6, 2016), https://eeas.europa.eu/sites/eeas/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Better Protecting Refugees*, *supra* note 9, at 4.

75. European Council, *Informal Meeting of EU Heads of State or Government, Malta, 03/02/2017,* http://www.consilium.europa.eu/en/meetings/european-council/2017/02/03-informal-meeting/.

76. *Id.* at 4.

77. European Council Press Release, *Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route* (Feb. 3, 2017).

78. *Id.* ¶ 2.

Plan have allowed us to deepen long-term cooperation with a number of partner countries, including on root causes of migration, through a solid partnership based on mutual trust. This work is already yielding results and will be intensified."[79] Acknowledging that "[e]fforts to stabilize Libya are now more important than ever, and the EU will do its utmost to contribute to that objective," the EU leaders decided on several priorities aimed at strengthening capacity-building efforts[80] and allocating resources to address those priorities.[81]

To take stock of the progress made under the joint Valletta Action Plan and Declaration, Senior Officials met in Malta on February 8-9, 2017.[82] Delegations from Africa and Europe participated and the meeting adopted a set of joint conclusions reiterating their commitment to the principles of "solidarity, partnership, and shared responsibility" in the areas of mobility and migration management.[83] Recognizing the benefits of well-managed migration to countries of origin, transit and destination, they reiterated their commitment to pursue the aims of the Valletta Action Plan, which requires cooperation, coordination, and partnership among all stakeholders.[84]

Among the key messages, the participants called for addressing the root causes of migration[85] and efforts to promote legal migration.[86] They also recognized the need to strengthen international protection,[87] and for "a stronger focus on measures aimed at fighting trafficking in human beings and migrant smuggling, as well as implementing integrated border management and cross-border cooperation.[88]

In a statement at the Senior Officials' meeting, the Director of the Europe Bureau on behalf of UNHCR, Vincent Cochetel, stressed the need to provide differentiated responses between refugees and asylum seekers, who cannot return to their home countries, and migrants.[89] He warned against the potential risk of a fragmented approach to the funding for activities carried out under the joint Valletta Action Plan and the Declaration because several bilateral actions and projects by EU Member States since the Valletta Summit were not coordinated with the EU funded programs and projects under the Emergency Trust Fund for Africa. Thus, he called for "comprehensive, integrated and better coordinated approaches across all EU

79. *Id.* ¶ 4.

80. *Id.* ¶ 6.

81. *Id.* ¶ 7.

82. *Senior Officials' Meeting (SOM) held in Malta, on 8 and 9 February 2017*, RABAT PROCESS, https://processus-de-rabat.org/en/rabat-process-in-action/208-senior-officials-meeting-som-valletta-2.html.

83. Joint Conclusions, Joint Valletta Action Plan, *Senior Officials' Meeting (SOM) in Malta 8-9 February 2017* at 1.

84. *Id.* at 2, ¶ 4.

85. *Id.* at 3, ¶ 1.

86. *Id.* at 3, ¶ 2.

87. *Id.* at 3, ¶ 3.

88. *Id.* at 3, ¶ 4.

89. UNHCR, *Statement delivered by Vincent Cochetel, Director of Europe Bureau on behalf of UNHCR, Senior Officials Meeting of the Valletta Summit on Migration 8–9 February 2017* (Feb. 10, 2017), http://www.refworld.org/docid/589dc9e34.html.

funded actions, including those undertaken bilaterally to ensure maximum impact."[90] He underlined the importance of increasing available safe legal pathways to protection, specifically for refugees.

Mr. Cochetel added:

> Despite the direct link between family reunification and successful local integration, refugees still experience unnecessary hardship in ensuring that their families can join them. Resettlement quotas remain limited, almost virtual. As an example, less than 2,000 refugees have been resettled from Ethiopia and Sudan to Europe over the last three years. Labor mobility or overseas educational schemes for refugees from their region of flight also remain almost inexistent. Combatting the business models of traffickers will only be truly successful if such legal pathways for refugees are accessible to them.[91]

With 25,000 unaccompanied and separated children having arrived in Italy, he called on states to address this challenge through a child protection dialogue and take decisions based on the best interest of the children, which may be best served by "family reunion" and reintegration assistance with relatives in their country of origin and [or] local integration or legal transfers to a third country,"[92] rather than channeling them into asylum or other enforcement-related procedures.

Earlier, in December 2016, the UNHCR had proposed in a study entitled *Better Protecting Refugees in the EU and Globally*,[93] a common, principled and pragmatic approach for the EU to migration and asylum, which builds on the New York Declaration.[94] The study called for a comprehensive EU asylum and refugee policy, both in its internal and external dimensions, which should have the capacity to address and respond to movements of people effectively.[95] It elaborated further under four headings: an EU that 1) is engaged beyond its borders to protect, assist and find solutions by developing sustainable asylum systems;[96] 2) is prepared to respond to possible future arrivals in significant numbers;[97] 3) protects through a well-managed common asylum system that ensures access to territory;[98] and 4) integrates refugees in their communities.[99]

The effectiveness of the EU's MPF initiative, which is debatable, will be evaluated in part VI.

Long before the mass migration crisis caused by the large-scale and uncontrolled influx of migrants, EU countries had been developing a Common

90. *Id.*
91. *Id.*
92. *Id.*
93. *Better Protecting Refugees*, *supra* note 9.
94. *Id.* at 2; N.Y. Declaration, *supra* note 4.
95. *Better Protecting Refugees*, *supra* note 9, at 2.
96. *Id.* at 4.
97. *Id.* at 8.
98. *Id.* at 10.
99. *Id.* at 19.

European Asylum System.[100] After the adoption of several legislative measures harmonizing common minimum standards over the years, and several reforms,[101] in May and July 2016, the European Commission presented proposals for another major reform "based on common rules, a fairer sharing of responsibility, and safe legal channels for those who need protection to get it in the EU."[102] The Commission stated that the reform

> establishes a fully efficient, fair and humane asylum policy which functions effectively both in times of normal and in times of high migratory pressure. It ensures a fair allocation of asylum applications among Member States and provides for a common set of rules at EU level to simplify and shorten the asylum procedures, discourage secondary movements and increase the prospect of integration.[103]

The European Commission describes the main legislation on asylum in the EU:

> Asylum Procedures Directive: establishes common standards of safeguards and guarantees to access a fair and efficient asylum procedure.
>
> Reception Conditions Directive: establishes minimum common standards of living conditions for asylum applicants; ensures that applicants have access to housing, food, employment and health care.
>
> Qualification Directive: establishes common grounds for granting international protection and foresees a series of rights for its beneficiaries (residence permits, travel documents, access to employment and education, social welfare and healthcare).
>
> Dublin Regulation: determines which Member State is responsible for examining a given asylum application.
>
> EURODAC Regulation: establishes an EU asylum fingerprint database. When someone applies for asylum, no matter where in the EU, their fingerprints are transmitted to the EURODAC central system.[104]

It is noteworthy that under the Dublin Mechanism, the responsible Member State is usually the state through which the asylum seeker first entered the EU, and thus the responsibility is primarily left to the Member States located at the external borders of the EU. As Greece was overwhelmed with the migrants crossing to its shores from Turkey and the responsibility was not shared, especially by the Northern European countries, the Dublin regime has seemingly failed. In Part VI, I will elaborate further.

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100. *Common European Asylum System*, EUROPEAN COMMISSION (June 12, 2016), https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.

101. *Id.*

102. *The Common European Asylum System (CEAS)*, EUROPEAN COMMISSION, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160713/factsheet_the_common_european_asylum_system_en.pdf.

103. *Id.*

104. *Id.*

IV. RECENT DEVELOPMENTS RELATED TO REFUGEE ADMISSIONS IN THE UNITED STATES

The movement of refugees and migrants has recently become a major, central area of contention in the United States, beyond its usual place as merely important. Within the first three months of its existence, the new Trump administration ordered an abrupt halt to the processing of refugees and asylum-seekers. The expressed intention was to avert potential terrorist attacks within the US. This Order was promptly rebuffed by the courts. The Trump administration then scaled back its Order, and was again rebuffed. At issue was the motivating intent of the action and its justifiability under the US Constitution and international refugee regimes.

During his presidential election campaign, Donald Trump voiced the anxiety of many Americans over refugees entering America from predominantly Muslim countries. Accordingly, within a week following his inauguration as President, Trump announced a ban on refugees or migrants from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.[105]

Executive Order 13769 of January 27, 2017,[106] entitled *Protecting the Nation*

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105. Executive Order 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 Fed. Reg. 8977 (Jan. 27, 2017), https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states [hereinafter EO-1].

106. *Id.* In the parts relevant to this article, the Order provides:

> Sec. 2. Policy. It is the policy of the United States to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.
>
> . . . .
>
> Sec. 3. ... (c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to section 212(f) of the INA, 8 U.S.C. § 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. § 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).
>
> Sec. 5. Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017. (a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures. Upon the date that is 120 days after the date of this order, the Secretary of State shall resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that such additional procedures are

from Foreign Terrorist Entry into the United States, reduced to less than half the number of refugees who would be accepted into the US and suspended for four months processing of refugees under the US Refugee Admissions Program.[107] Under this program, refugees and asylum seekers are generally processed into the country under recognized criteria and are given assistance and opportunities for settlement. The Order also suspended processing of refugees from Syria until further notice and suspended entry of persons from countries whose vetting standards do not meet US requirements.

Executive Order 13769 cited pertinent US law,[108] which authorizes the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate," if he finds that their entry "would be detrimental to the interests of the United States." This language from the Immigration and Nationality Act of 1952[109] was amended by the Immigration and Nationality Act of 1965,[110] which provides,

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adequate to ensure the security and welfare of the United States.

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.

(c) Pursuant to section 212(f) of the INA, 8 U.S.C. § 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.

...

(e) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship—and it would not pose a risk to the security or welfare of the United States.

107. Memorandum for the Secretary of State on the Refugee Admissions for Fiscal Year 2017, THE WHITE HOUSE; OFFICE OF THE PRESS SECRETARY (Sept. 28, 2016), ("In accordance with section 207 of the Immigration and Nationality Act...(8 U.S.C. § 1157), and after appropriate consultations with the Congress, I hereby make the following determinations and authorize the following actions: The admission of up to 110,000 refugees to the United States during Fiscal Year...2017 is justified by humanitarian concerns or is otherwise in the national interest; ...."), https://obamawhitehouse.archives.gov/the-press-office/2016/09/28/presidential-determination-refugee-admissions-fiscal-year-2017.

108. 8 U.S.C. § 1182(f).

109. Immigration and Nationality Act of 1952 Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. ch. 12).

110. Immigration and Nationality Act of 1965 Pub. L. No. 89-236, 79 Stat. 911 (1968) (codified at 8 U.S.C. ch. 12).

inter alia: "No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."[111]

Thus, despite the administration's protestations to the contrary, President Trump's campaign promises, banning immigration of Muslims and people from predominantly Muslim countries, were found to evidence the administration's intent when lawsuits challenging the Executive Order were brought in numerous federal courts. Those courts thus rejected the administration's argument that the Order was necessitated only by security concerns.

In nearly 50 lawsuits challenging the Order after it was announced, between January 28 and January 31, federal courts granted temporary relief, including a temporary restraining order (TRO) barring enforcement of core elements of the Order, including its provisions suspending entry for nationals from the seven listed countries for 90 days and limiting the acceptance of refugees.[112] The courts often highlighted the special priority that had been promised for "certain religious minorities," as had been stated by President Trump in an interview on the day he signed the order, that Syrian Christian refugees would be given priority status in the United States.[113]

On February 3, District Judge James Robart of the Western District of Washington at Seattle granted the first TRO in *Washington* [later joined by Minnesota] *v. Trump*.[114] The court stated:

> The proper legal standard for preliminary injunctive relief [and temporary restraining order] requires a party to demonstrate (1) 'that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.' [Citations omitted.][115]

In the alternative, Judge Robart noted,

> [A]n injunction is appropriate if "serious questions going to the merits were raised and the balance of the hardships tips sharply in the plaintiff's favor," thereby allowing preservation of the status quo when complex legal questions require further inspection or deliberation, [provided] the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest. [Citations omitted.][116]

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111. 8 U.S.C. § 1152(a).

112. The following section considers a few of the actions.

113. *See* Glenn Kessler, *Trump's Claim that it is 'Very Tough' for Christian Syrians to get to the United States,* WASH. POST: FACT CHECKER (Jan. 28, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/28/trumps-claim-that-it-is-very-tough-for-christian-syrians-to-get-to-the-united-states/?utm_term=.e147c7cd1fb4.

114. Washington v. Trump, No. C17-0141JLR (W.D. Wash. Feb. 3, 2017), *appeal dismissed sub nom. Washington, et al., v. Donald J. Trump, et al.*, (Feb. 4, 2017).

115. *Id.* at 3.

116. *Id.* at 3–4.

The court found in favor of the plaintiffs, ordered that sections 3(c)[117] and 5(a), (b), (c), and (e)[118] not be enforced, and found further that, under the legislative imperative that the immigration laws be administered uniformly throughout the country, this order enjoining enforcement must be effective nationwide and thus could not be limited to the plaintiff states.[119] The government filed its appeal and an emergency motion to stay the TRO in the Ninth Circuit Court of Appeals, which denied the motion on February 9, 2017.[120]

On February 14, Judge Leonie Brinkema of Virginia issued a similar ruling, granting the plaintiffs a preliminary injunction against the travel ban.[121] She found the Order clearly discriminatory and emphasized its violation of the First Amendment Establishment Clause.[122] Looking at the proliferation of evidence against the ban as showing clear intent to ban Muslims, she stated, *inter alia*, that "[i]t is a discriminatory purpose that matters, no matter how inefficient the execution."[123] She ultimately found, "[E]njoining unconstitutional action by the Executive Branch is always in the public's interest."[124]

The administration's appeal in the Ninth Circuit was subsequently voluntarily dismissed by the administration[125] when it issued Order 13780 (EO-2) on March 6, 2017, similarly entitled *Protecting the Nation From Foreign Terrorist Entry into the United States*.[126]

On March 15, Judge Theodore Chuang of the District of Maryland blocked section 2(c)[127] of the revised order, which purported to ban travel into the US by citizens from Iran, Libya, Somalia, Sudan, Syria, and Yemen, Iraq having been exempted from the list in Order 13780.[128] And on March 17, Washington's Judge Robart, in a new case, *Ali v. Trump*,[129] stayed the action allowing the Hawaii ruling to govern the matter across the country.[130]

Later in March, some 13 states joined together to support the Trump travel ban. On March 24, 2017, US District Court Judge Anthony Trenga found that the March 6 travel ban was sufficiently different from the initial one and thus the plaintiffs were

117. EO-1, *supra* note 105, at § 3(c).

118. *Id.*, §§ 5(a), (b), (c), and (e).

119. Washington v. Trump, *supra* note 114, at 6.

120. Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017), *reconsideration en banc denied*, No. 17-35105, (9th Cir. Mar. 15, 2017).

121. Aziz v. Trump, No. 117cv00116LMBTCB (E.D. Va., Feb. 13, 2017) [hereinafter Aziz].

122. *See* Rachel Weiner, *Federal judge in Virginia issues strong rebuke of Trump travel ban*, WASH. POST (Feb. 14, 2017), https://www.washingtonpost.com/local/public-safety/judge-in-virginia-grants-preliminary-injunction-against-travel-ban/2017/02/13/a6164bfe-f255-11e6-a9b0-ecee7ce475fc_story.html?tid=a_inl&utm_term=.c41f3e0de8eb.

123. *Aziz*, *supra* note 121, at 9.

124. *Id.* at 11.

125. Washington v. Trump, No. cv-0141JLR (W.D. Wash. Mar. 8, 2017) *dismissed.*

126. Exec. Order No. 13,780, 82 FR 13209 (Mar. 6, 2017) [hereafter EO-2].

127. Intl. Refugee Assistance Project v. Trump, CV TDC-17-0361, (D. Md. Mar. 16, 2017).

128. *See* EO-2, *supra* note 126.

129. Ali v. Trump, No. C17-0135JLR (W.D. Wash. Mar. 17, 2017).

130. *Id.*

"no longer likely...[to] succeed on their claim that the predominate purpose of EO-2 is to discriminate against Muslims based on their religion and that EO-2 is a pretext or a sham for that purpose."[131] He thus denied the TRO requested by the plaintiff.[132]

However, on March 29, Judge Watson of Hawaii granted the plaintiffs' motion to convert the temporary restraining order he had previously entered to a Preliminary.Injunction enjoining the enforcement or implementation of sections 2[133]

131. Sarsour v. Trump, Case No. 1:17cv00120, 12 (E.D. Va., Mar. 24, 2017).

132. *Id.* at 32.

133. Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017),

> Sec. 2.(a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.
>
> (b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.
>
> (c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. §§ 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.
>
> d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.
>
> (e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.
>
> (f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney

and 6[134] of the second Executive Order across the nation.[135] He found that the new Order was indeed a "'sanitize[d]'"[136] version of the prior Executive Order and noted that the events leading up to the "adoption of the challenged Executive Order are as

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General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.")

134. Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017),

Sec. 6. Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017. (a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

(c) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

135. Hawaii v. Trump, No. 17-00050 (D. Haw., Mar. 29, 2017) (order granting motion to convert TRO to a preliminary injunction) [hereinafter Watson 2].

136. *Id.* at 18.

full of religious animus, invective, and obvious pretext as is the record here, it is no wonder that the Government urges the Court to altogether ignore that history and context."[137]

Judge Watson declined to stay this ruling or hold it in abeyance should an appeal of this Order be filed[138] and that next day, March 30, the administration filed its appeal of Judge Watson's decision to the Ninth Circuit Court of Appeals.[139]

While the travel ban saga continued in the courts, the provisions directed at the US Refugee Admissions Program in Section 6[140] violate America's commitments under international refugee law, which is incorporated in US domestic law. It also runs afoul of the US commitment under the New York Declaration on Refugees and Migrants.[141]

Experts and advocacy groups took issue with the President's premise that refugees from the listed countries were especially likely to commit terrorist attacks within the United States because those groups had been responsible for previous attacks; this was factually inconsistent with the actual record of such attacks. To illustrate, terrorism scholar Charles Kurzman of the University of North Carolina has stated that there had been no terrorist killing in the US by any person who had emigrated or whose parents had emigrated from the seven listed countries since September 11, 2001, and that only two of the 9/11 attackers would have been identified to fall within the restricted countries because of their national origin, and they had resided in the US for several years.[142]

Another expert asked:

> Had this temporary prohibition been in effect since 9/11, how many lives would have been saved? Not one. None of the fatalities resulted from attacks by individuals from the seven countries named in the directive. The directive also would not have prevented the 9/11 attacks. This is not an argument for adding to the list of proscribed countries.[143]

The same conclusion was stated by the Department of Homeland Security Intelligence and Analysis Unit in an internal report which found that people from the countries listed in the ban "pose no increased terror risk,"[144] and that "country of

137. *Id.* at 16.

138. *Id.*

139. Hawaii v. Trump, No. 17-00050 (D. Haw. Mar. 30, 2017) (Notice of Appeal).

140. Exec. Order 13780 § 6, *supra* note 134.

141. N.Y. Declaration, *supra* note 4.

142. CHARLES KURZMAN, MUSLIM-AMERICAN INVOLVEMENT WITH VIOLENT EXTREMISM 2, Triangle Ctr. on Terrorism and Homeland Sec., Uni. of N.C. Chapel Hill. (Jan. 26, 2017).

143. Brian Michael Jenkins, *Why a Travel Restriction Won't Stop Terrorism at Home*, THE RAND BLOG (Feb. 10, 2017), www.rand.org/blog/2017/02/why-a-travel-restriction-wont-stop-terrorism-at-home.html.

144. Vivian Salama & Alicia A. Caldwell, *AP Exclusive: DHS report disputes threat from banned nations,* THE BIG STORY: ASSOCIATED PRESS (Feb. 24, 2017, 6:36 PM), http://bigstory.ap.org/article/39f1f8e4ceed4a30a4570f693291c866/dhs-intel-report-disputes-threat-posed-travel-ban-nations.

citizenship is unlikely to be a reliable indicator of potential terrorist activity."[145]

Under Executive Order 13780, the most recent US commitment to admit 110,000 refugees in 2017 has been reduced to 50,000, with a stay of 120 days on further processing and imposition of numerous further restrictions on their eligibility, beyond the very stringent vetting process already in place for refugee admissions.[146]

V. APPLICABLE INTERNATIONAL LAW

As human rights apply to all persons, irrespective of their migration status or their nationality, migrants and members of their families, as well as refugees, enjoy the protection of international human rights law. Migrants also enjoy international labor standards and, more specifically, protection under the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers Convention), adopted by the UN General Assembly in 1990. In addition, several International Labor Organization (ILO) instruments apply to migrants in general, while several apply specifically to migrant workers. Refugees are specially protected under the current international refugee regime – the 1951 Convention and the 1967 Protocol.

Selected applicable instruments are noted here, without elaboration, with the only exceptions being the Refugee Regime, the 1990 Migrant Workers Convention, and two ILO Conventions.

A. Selected International Human Rights Instruments

International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966.[147]

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Dec. 10, 2008.[148]

International Covenant on Civil and Political Rights, Dec. 16, 1966.[149]

Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966.[150]

Second Optional Protocol to the International Covenant on Civil and Political

145. Ron Nixon, *People From 7 Travel-Ban Nations Pose No Increased Terror Risk, Report Says*, N.Y. TIMES (Feb. 25, 2017), https://www.nytimes.com/2017/02/25/us/politics/travel-ban-nations-terror-risk.html?_r=0; *see also* Eric Tucker, *AP Fact Check: No arrests from 7 nations in travel ban?*, ASSOCIATED PRESS (Feb. 6, 2017), https://apnews.com/cf244d096e084e7a943b45168deafc5f/AP-FACT-CHECK:-No-arrests-from-7-nations-in-travel-ban?-Nope.

146. EO-2, section 6, *supra* note 126.

147. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

148. G.A. Res. 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, (Dec. 10, 2008).

149. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

150. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

Rights, aiming at the abolition of the death penalty, Dec. 15, 1989.[151]

International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965.[152]

Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979.[153]

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999.[154]

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 1, 1984.[155]

Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002.[156]

Convention on the Rights of the Child, Nov. 20, 1989.[157]

Optional Protocol to the Convention on The Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000.[158]

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000.[159]

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children on a Communications Procedure, Dec. 19, 2011.[160]

Convention on the Rights of Persons with Disabilities, Dec. 13, 2006.[161]

Optional Protocol to the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006.[162]

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151. G. A. Res. 44/128, at 206, Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (Dec. 15, 1989).

152. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 12, 1969, 660 U.N.T.S. 212.

153. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

154. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 6 Oct. 6, 1999, 2131 U.N.T.S. 83.

155. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 85 U.N.T.S. 1465, http://www.refworld.org/docid/3ae6b3a94.html.

156. Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, Jan. 9, 2003, A/RES/57/199, http://www.refworld.org/docid/3de6490b9.html.

157. Convention on the Rights of the Child, Nov. 20, 1989, 3 U.N.T.S. 1577, http://www.refworld.org/docid/3ae6b38f0.html.

158. G.A. Res. 54/263, annex II, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Mar. 16, 2001), http://www.refworld.org/docid/3ae6b38bc.html.

159. G.A. Res. 54/263, Annex I, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Mar. 16, 2001).

160. Human Rights Council, U.N. Doc. A/HRC/RES/17/18, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (July 14, 2011).

161. G.A. Res. 61/106, Annex I, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

162. G.A. Res. 61/106, Annex II, Optional Protocol to the Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

International Convention for the Protection of all Persons from Enforced Disappearance, Dec. 20, 2006.[163]

Universal Declaration of Human Rights, Dec. 10, 1948.[164]

Declaration of the High-level Dialogue on International Migration and Development, 2013.[165]

B. International Labor Organization Instruments

The 1998 ILO Declaration on Fundamental Principles and Rights at Work[166] –

1) Freedom of Association and the Effective Recognition of the Right to Collective Bargaining;[167]

2) Elimination of All Forms of Forced or Compulsory Labor;[168]

3) Effective Abolition of Child Labor;[169] and

4) Elimination of Discrimination in Respect of Employment and Occupation.[170]

It should be noted that migrant workers' needs are specially mentioned in the Declaration's Preamble.

ILO Convention Number 189 – Domestic Workers' Convention, 2011.[171]

ILO Convention Number 97 – Migration for Employment Convention

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163. International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 48088.

164. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) 217 A (III).

165. G.A. Res. 68/4, ¶¶ 11-12, UN General Assembly, Declaration of the High-level Dialogue on International Migration and Development (Jan. 21, 2014) (The Declaration recognized "[t]hat women and girls account for almost half of all international migrants at the global level, and the need to address the special situation and vulnerability of migrant women and girls by, inter alia, incorporating a gender perspective into policies and strengthening national laws, institutions and programmes to combat gender-based violence, including trafficking in persons and discrimination against girls." The General Assembly emphasized "the need to establish appropriate measures for the protection of women migrant workers in all sectors, including those involved in domestic work.").

166. *ILO Declaration on Fundamental Principles and Rights at Work*, ILO (June 18, 1998), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_467653.pdf.

167. *Freedom of Association and Protection of the Right to Organise Convention*, No. 87, ILO (July 9, 1948), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C087.

168. *Forced Labour Convention*, No. 29, ILO (June 28, 1930), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312174:NO.

169. ILO, *Freedom of Association and Protection of the Right to Organise Convention*, *supra* note 167, ¶ 2(a).

170. *Convention Concerning Discrimination in Respect of Employment and Occupation*, No. 111, ILO (June 4, 1958), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C111.

171. *Domestic Workers Convention*, No. 189, ILO (June 16, 2011), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C189.

(revised), 1949.[172]

ILO Recommendation Number 86 – Migration for Employment Recommendation (revised), 1949.[173]

ILO Convention Number 143 – Migrant Workers' (Supplementary Provisions) Convention, 1975.[174]

ILO Recommendation Number 151 – Migrant Workers' Recommendation, 1975.[175]

C. Migrant Workers Convention[176]

As a core landmark international human rights treaty, this is the most comprehensive international treaty on 1) the rights of migrant workers and their families, 2) migration regulation, and 3) interstate cooperation. The Convention explicitly states that all fundamental rights articulated in the international bill of rights and all international human rights instruments apply to all migrant workers. The Convention's provisions to protect undocumented migrant workers in an irregular situation are premised on the recognition in the Preamble that such workers face even more serious human problems than those faced by persons in a regular situation (documented migrant workers). Also, these migrant workers "are frequently employed under less favorable conditions of work than other workers."[177] Thus, in Part III (arts. 8-35), all migrant workers and their families, including undocumented workers, are granted civil and political rights,[178] as well as economic, social and cultural rights.[179]

D. ILO Convention No. 97 & Recommendation No. 86 and ILO Convention 143

In 1966, the ILO adopted Convention No. 97 and Recommendation No. 86 concerning Migration for Employment (Revised).[180] Under these instruments, the

172. *Migration for Employment Convention (Revised)*, No. 97, ILO (June 8, 1949), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C097.

173. *Migration for Employment Recommendation (Revised)*, No. 86, ILO (June 8, 1949), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R086.

174. *Migrant Workers (Supplementary Provisions) Convention*, No. 143, ILO (June 4, 1975), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C143.

175. *Migrant Workers Recommendation,* No. 151, ILO (June 4, 1975), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R151.

176. G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Dec. 18, 1990); *see also* Ved P. Nanda, *The Protection of the Rights of Migrant Workers: Unfinished Business*, 2 ASIAN & PACIFIC MIGRATION J. 161, 161 (1993).

177. G.A. Res. 45/158, *supra* note 177, at Annex, Preamble.

178. *Id.* at pt. III, arts. 8–24.

179. *Id.* at arts. 25–35.

180. Convention (No. 97) Concerning Migration for Employment (Revised 1949) art. 6, ¶ 1, July 1,

principle of equal treatment was further elaborated. Subsequently, in 1975, the ILO adopted Convention No. 143, concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Supplementary Provisions).[181] In Part I, this Convention obligates each State Party to respect the "basic human rights of all migrant workers,"[182] including those who are not legal migrants, and to adopt all measures that are "necessary and appropriate" to suppress the clandestine movement of workers and illegal employment of migrants. States are required to provide sanctions against employers of illegal immigrants, with the aim to prosecute those trafficking in labor.[183]

Part II of Convention No. 143 applies only to legal migrants and States Parties are obligated to declare and pursue national policies to promote equality of treatment between migrant workers and nationals pertaining to employment and occupation, social security, cultural rights and trade union rights, and individual and collective freedoms.[184]

E. The International Refugee Regime

Under the 1951 Convention[185] and the 1967 Protocol relating to the Status of 1967 Protocol relating to the Status of Refugees,[186] a person officially referred to as a "refugee" is one who has lost the protection of the government of his/her nationality or permanent residence and has fled that state seeking refuge and assistance in another country. The refugee must have fled the state due to persecution or a well-founded fear of being persecuted for reasons of "race, religion, nationality, membership in a particular social group, or political opinion." Under the system, individual claims are addressed for protection and the system is not responsive to situations of mass influx. Those who have fled or attempted to flee but who have not been allowed to leave or have not been able to leave the country are generally referred to as "internally displaced persons." In light of the current refugee crisis, this definition of a refugee is rather inadequate to meet the needs of those fleeing war, famine, economic deprivation and natural disasters.

To fill the gap in the 1951 Convention's narrow definition of a refugee, regional efforts took place in Africa and Latin America to widen the definition. In 1969, the Organization of African Unity (now the African Union) adopted the Convention on the Specific Aspects of Refugee Problems in Africa.[187] It expanded the definition in

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1949, 120 U.N.T.S. 71; International Labour Organization, *supra* note 174, at annex, art. 17.

181. ILO, *Migrant Workers Recommendation*, *supra* note 175.

182. *Id.* at pt. 1, art. 1.

183. *Id.* at pt. 1, art. 3.

184. *Id.* at pt. 2, arts. 10–14.

185. Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

186. U.N. General Assembly, *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267, http://www.refworld.org/docid/3ae6b3ae4.html.

187. Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 1(2), 1000 U.N.T.S. 45, 8 I.L.M. 1288, Sept. 10, 1969 (entered into force June 20, 1974), http://www.refworld.org/docid/3ae6b36018.html.

the Convention by accepting as refugees those who are compelled to flee because of external aggression, occupation, foreign domination, or events seriously disturbing public order. Subsequently, in 1984, ten Central American states adopted a similar approach in the non-binding Cartagena Declaration,[188] expanding the definition further by adding flight from generalized violence, internal conflicts, and massive violation of human rights.

VI. ANALYSIS

Despite several international and regional attempts to address the complex challenges of migrants and refugees, the problem persists. And since 2014 it has indeed worsened with rising xenophobia and anti-immigration violence in several countries. The UN General Assembly declaration addressing the problem, the New York Declaration, discussed above, brought the world's leaders together to explore common ground aimed at protecting the rights of migrants and refugees. The outcome, however, was mixed. While UNHCR officials considered the Declaration a "game changer for refugee protection and for migrants"[189] and "nothing short of a miracle,"[190] the fact remains that it was not legally binding and lacked tangible outcomes.

As the first General Assembly declaration specifically on refugees and migrants, it acknowledged the high level of human mobility and its magnitude and complexity. This evidently shows that the world cares about refugees and migrants. This expression, in itself, is laudable, as are the principles and commitments agreed by world leaders and enshrined in it. These include: "We . . . will fully protect the human rights of all refugees and migrants, regardless of status;"[191] and "We declare our profound solidarity and support" for migrants and their families.[192] The leaders expressed their determination "to find long-term and sustainable solutions,"[193] and "to address the root causes of large movements of refugees and migrants, including through increased efforts aimed at early prevention of crisis situations based on preventive diplomacy."[194] The Declaration also contains specific provisions for the protection of migrant women and children and for supporting countries affected by migration.

However, this lofty rhetoric and these lofty principles notwithstanding, the Declaration did not adequately and effectively address the enormous challenges the

188. 1984 Cartagena Declaration on Refugees, OAS / Ser. L/V/II.66, doc. 10, Rev. 1, 190-3 http://www.refworld.org/pdfid/51c801934.pdf.

189. *UN Summit seen as "game changer" for refugee and migrant protection*, UNHCR (Sept. 6, 2016), http://www.unhcr.org/en-us/news/latest/2016/9/57ceb07e4/un-summit-game-changer-refugee-migrant-protection.html.

190. Volker Türk, *The New York Declaration: Once-in-a-lifetime opportunity to enhance refugee protection*, UNHCR (Oct. 12, 2016), http://www.unhcr.org/admin/dipstatements/57fe577b4/new-york-declaration-once-lifetime-opportunity-enhance-refugee-protection.html.

191. N.Y. Declaration, *supra* note 4, at 5.

192. *Id.* at 8.

193. *Id.* at 10.

194. *Id.* at 12.

world community faces with the current migration crisis. As the Declaration is a voluntary and non-binding document, the commitments are not measurable, there is no obligation to implement the commitments and there is no concrete plan of action. But for the goal two years hence to develop a global compact on refugees,[195] there is and a global compact for "safe, orderly and regular migration"[196] there is no timeline for action in the Declaration. Alexander Betts, the head of Oxford's Refugee Studies Center, called the Declaration "thin on content and connections to practice."[197]

The Declaration also suffers from several gaps, such as excluding from its agenda the challenge of Internally Displaced Persons (IDPs) – it simply mentions in passing that there are more than 40 million IDPs[198] and notes that the needs of such persons along with those of refugees and migrants are explicitly recognized in the 2030 Agenda for Sustainable Development.[199] The Declaration also fails to include the protection of vulnerable migrants and does not explicitly prohibit the detention of children.

The Declaration fails to provide guidelines on protection for migrants in vulnerable situations, offering instead just assistance, as it states:

We will consider developing non-binding guiding principles and voluntary guidelines, consistent with international law, on the treatment of migrants in vulnerable situations, especially unaccompanied and separated children who do not qualify for international protection as refugees and who may need assistance.[200]

It is appropriate to ask why migrants who flee humanitarian crises, severe violence, famine, gangs, would not receive protection, but only assistance. The Member States should be considering developing principles and guidelines for their actual protection and not merely assistance.

The Declaration also stops short of committing to end the immigration detention of children. Although Member States said in the Declaration that they would pursue alternatives to detention while the assessment of the migrants' legal status, entry, and stay is being considered, the leaders added:

Furthermore, recognizing that detention for the purpose of determining migration status is seldom, if ever, in the best interest of the child, we will use it only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we

195. *Id.* at 21.

196. *Id.* at annex II(1).

197. Alexander Betts, *U.N. Refugee Summit: Abstract Discussions in the Face of a Deadly Crisis: In the first of a two-part prelude to the U.N. summit, Alexander Betts, the head of Oxford's Refugee Studies Centre, plots the flawed origins of a meeting some states celebrate having sabotaged*, NEWS DEEPLY (Sept. 12, 2016), https://www.newsdeeply.com/refugees/community/2016/09/12/u-n-refugee-summit-abstract-discussions-in-the-face-of-a-deadly-crisis.

198. N.Y. Declaration, *supra* note 4, at 3.

199. *Id.* at 16.

200. *Id.* at 52.

will work towards the ending of this practice.[201]

Notwithstanding all these qualifications, it bears repeating: detention is never in the best interest of the child. As the Council on Community Pediatrics has stated,

> The conditions in which children are detained [in the United States] and the support services that are available to them are of great concern to pediatricians and other advocates for children. In accordance with internationally accepted rights of the child, immigrant and refugee children should be treated with dignity and respect and should not be exposed to conditions that may harm or traumatize them. The Department of Homeland Security [DHS] facilities do not meet the basic standards for the care of children in residential settings.[202]

The Council recommends: "DHS should discontinue the general use of family detention and instead use community-based alternatives to detention for children held in family units."[203] Earlier, in June 2014, a Human Rights Watch researcher had spoken at a hearing of the US House of Representatives Committee on Homeland Security: "The US government's policy of detaining large numbers of children harms kids and flouts international standards."[204] She added, "Congress should be exploring alternatives to detention that other countries facing spikes in border crossings have used successfully."[205]

In the New York Declaration, Member States did commit to promoting international cooperation on border control and management but noted that "[s]tates are entitled to take measures to prevent irregular border crossings."[206] This raises the concern that states may feel empowered to resort to taking especially harsh border control measures aimed at deterring migrants and refugees from entering.

That is exactly what has happened in many European countries which, when Faced with an unprecedented flow of migrants into the continent, built fences and used many deterrence measures and strict border controls to keep migrants from entering. As for the European Union initiatives, it undertook the MPF initiative mentioned above[207] and further reformed the Common European Asylum System.[208] The MPF and the Malta Declaration reflect Europe's desire to control and secure its borders, but this will likely be achieved at the cost of violating its obligations under

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201. *Id.* at 33.

202. Julie M. Linton, et al., *Detention of Immigrant Children*, 139 PEDIATRICS 4, 1 (2017), http://pediatrics.aappublications.org/content/pediatrics/early/2017/03/09/peds.2017-0483.full.pdf.

203. *Id.* at 8.

204. Clara Long, *US: Surge in Detention of Child Migrants: Congress Should Protect, Not Punish, Unaccompanied Children*, HRW (June 25, 2015), https://www.hrw.org/news/2014/06/25/us-surge-detention-child-migrants.

205. *Id. See also* François Crépeau, *Any detention of migrant children is a violation of their rights and must end,* THE CONVERSATION (co-published with UNICEF) (Sept. 7, 2016), http://theconversation.com/any-detention-of-migrant-children-is-a-violation-of-their-rights-and-must-end-64985.

206. N.Y. Declaration, *supra* note 4, at 24.

207. Migration Partnership Framework, *supra* text accompanying note 71.

208. *See* European Commission: Migration and Home Affairs, *Common European Asylum System*, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en (last updated Apr. 22, 2017).

international law toward migrants, refugees, and asylum seekers, primarily the obligation to protect their human rights.

Although the EU is providing development aid to partner countries, many partner countries lack the wherewithal to fulfill their own obligations under the MPF, because of weak government institutions and frail political situations; Libya is a clear example. Thus, Europe will have to make substantial investments toward capacity building and improving the living conditions in its partner countries to ensure a significant reduction in migrant flows.[209] As to the reform of the Common European Asylum System, it has been aptly criticized as aimed at externalizing protection and reinforcing the EU's policy of containing refugees outside the EU through migration control and by sending asylum seekers to third states without examining their protection claims.[210]

The Dublin mechanism has been often reformed but remains broken, as only member states located at the external borders of the EU assume responsibility for migrants entering Europe. Also, it does not take into account the asylum seekers' preference. A November 2016 report by Human Rights Watch, entitled *EU Policies Put Refugees at Risk*,[211] states that the European Commission's reform of the Common European Asylum System is more informed by a logic of deterrence than a commitment to basic human rights. Far from insuring the right to family reunification, over the past year numerous EU countries have restricted the right to bring family members to safety, and there is a discernible trend towards granting subsidiary – temporary – protection over refugee status. Proposed changes to the EU directives governing procedures, qualifications for asylum, and reception conditions include some positive measures but also measures to punish asylum seekers for moving from one EU country to another, obligatory use of "safe country" and "internal flight alternative" concepts to deny protection, and compulsory reviews to enable revoking refugee status and subsidiary protection.[212]

The urgent need is to protect the fundamental human rights of migrants and refugees during transit and within the receiving state's territory, without discrimination. We find the current protection gap is created as a result of 1) crises in the home country of migrants and refugees and 2) stringent border controls by receiving states. An urgent reform on collective responsibility-sharing is essential because currently there is no equitable distribution of responsibility; the global south

209. For critical comments, *see* Olivia Akumu, *The EU's Ethical Dilemma: The scramble to stem the refugee and migrant flow into Europe*, MARTIN PLAUT WORDPRESS (Feb. 13, 2017), https://martinplaut.wordpress.com/2017/02/27/the-eus-ethical-dilemma-the-scramble-to-stem-the-refugee-and-migrant-flow/; Elizabeth Collett, *New EU Partnerships in North Africa: Potential to Backfire*, MIGRATION POLICY (Feb. 2, 2017), www.migrationpolicy.org/news/new-eu-partnerships-North-Africa-Potential-Backfire; Bob Van Dillen, *The EU Agenda Behind the Migration Partnership Framework*, CARITAS (June 29, 2016), http://www.caritas.eu/news/the-eu-agenda-behind-the-migration-partnership-framework.

210. Vincent Chetail, *Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System*, 5 EUR. J. HUM. RTS. 584, 587–88 (2016).

211. Human Rights Watch, *EU Policies Put Refugees at Risk*, HRW (Nov. 23, 2016), www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk.

212. *Id.*

carries a disproportionately large share. Similarly, an urgent need is to expand the number of legal pathways for refugee admission and settlement in third countries with access to jobs, as well as a prohibition on the detention of children and access for children to education and preservation of family unity. Only then will the smuggling of people stop.

Furthermore, humanitarian efforts and development must be linked. The private sector, the World Bank, and the current initiative regarding the Sustainable Development Goals and the 2030 Agenda,[213] will be essential so that refugees can become contributing members of society.

VII. CONCLUSION

The challenge indeed is formidable. A series of efforts has been ongoing for over a decade to find a solution. But the goal of comprehensive and effective global governance for migration through international cooperation has yet to be achieved.[214] In this state-centered international system, states are empowered to decide who enters their territory and on what terms. Given that reality, what is ultimately required is implementation of international human rights and labor standards that protect migrants and refugees' human rights, which states have already voluntarily accepted. However, what is in evidence is the states' efforts to manage migration to serve their interests. This they do by connecting policies such as those of deterrence, strict border controls, and meeting their labor needs. The two global compacts – one each on refugees and migrants – must aim for a human rights-based framework to inform the various provisions for inclusion in those compacts, such as shared responsibility, finance, resettlement, and other matters related to refugees' and migrants' protection.

We do not lack norms. But what is severely lacking is the political will to translate these norms into concrete, operational outcomes.

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213. While adopting the Sustainable Development Goals and the 2030 Agenda for Sustainable Development, the World Leaders at the UN Summit stated: "We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. ... Such cooperation should also strengthen the resilience of communities hosting refugees, particularly in developing countries." G.A. Res. 70/L.1, Transforming Our World: the 2030 Agenda for Sustainable Development, at 29 (Sept. 25, 2015). Goal 8.8 states: "Protect labour rights and promote safe and secure working environmental for all workers, including migrant workers, in particular women migrants, and those in precarious employment." *Id.* at 8.8. Goal 10.c states: "By 2030, reduce to less than 3 per cent the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5 percent." *Id.* at 10.c.

214. *See generally* Inter-Parliamentary Union, *Migration, Human Rights and Governance: Handbook for Parliamentarians No. 24* (2015), http://www.ohchr.org/Documents/Publications/MigrationHR_and_Governance_HR_PUB_15_3_EN.pdf; *see also* François Crépeau & Idil Atak, *Global Migration Governance: Avoiding Commitments on Human Rights Yet Tracing a Course for Cooperation*, 34/2 NETH. Q. OF HUM. RTS. 113, 113–146 (2016).

CODIFICATION OF INTERNATIONAL CRIMINAL LAW

*M. CHERIF BASSIOUNI

I. ROOTS AND BASES OF INTERNATIONAL CODIFICATION

The history of the human civilization appears to have started more than six million years ago while *homo sapiens*, from which we humans descended, first evolved in East Africa about 2.5 million years ago.[1] Throughout this process of evolution and development, *homo sapiens* and other early human species left traces of their existence and development in many locations around the world.[2] Archeologists undoubtedly found scattered evidence, mostly in epigraphy in caves, disclosing the existence of rules of conduct that would later on be called laws and methods of addressing those who violate them. In time, we have come to refer to these laws and methods as a legal system.[3] Surprisingly, throughout this long historical course, legal history did not record significant progress in legal codification.

The first such accomplishment is the Code of Hammurabi in 1772 BCE,[4] followed by what is referred to as the Ten Commandments brought down by Moses from Mr. Sinai and later recorded in the Tanakh and the Old Testament.[5]

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1. In the course of the subsequent two million years at least six human species inhabited the earth, including the *Neanderthals* that evolved in Europe and the Middle East some 500,000 years ago and the *mega fauna* in the Americas. Then about 45,000 years ago the *homo sapiens* migrated to and settled in Australia and some 30,000 years ago the *homo sapiens* migrated to Europe and caused the extinction of *Neanderthals*. The *homo sapiens* also caused the extinction of the *mega fauna* after migrating to the Americans approximately 16,000 years ago. *See* RICHARD LEAKEY, THE ORIGIN OF HUMANKIND (1996). *See also* Richard G. Klein, *Darwin and the Recent African Origin of Modern Humans*, 106 NAT'L A. SCIENCES U.S. 16007, 16007 (2009).

2. Erin Wayman, *How to Retrace Early Human Migrations*, SMITHSONIAN, Sep. 26 2012.

3. Tommaso Beggio, *Epigraphy, in* THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY 43 (Paul J de. du Plessis, Clifford Ando & Kaius Tuori eds., Laurence Hooper trans., 2016). *See* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 134–143 (5th ed. 2014).

4. *See* GLENN, *supra* note 3, at 97 n.2. *See also* Kathryn E. Slanski, *The Law of Hammurabi and its Audience*, 24 YALE J. L. & HUMAN. 97, 97–98 (2012). *See also* Martha T. Roth, *Mesopotamian Legal Traditions and the Laws of Hammurabi*, 71 CHI.-KENT L. REV. 13, 13–15 (1995-1996).

5. There is no historic record of the actual occurrence/existence of the Ten Commandments and their passage, therefore by archeologists' standards this would fall under the category of legend, since it cannot be proven. Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J. L. & REL. 525 (2000). This is also true of the Old Testament. *See* GLENN, *supra* note 3, at 99–130. *See also* ZEEV W. FALK, HEBREW LAW IN BIBLICAL TIMES (1964);

These and other historical sources and narratives indicate an emerging commonality of human and social values.[6] Certainly as time has passed and globalization has become a binding social and socio-psychological factor to the ever-evolving human society, increased commonality of shared human and social values, have emerged in different aspects of domestic law and gradually in what we have also called international law.[7] This process is evident in the history and evolution of the *jus in bello* and subsequently in the *jus ad bellum*.[8] Both of these subjects have in time become part of international criminal law as the *jus ad bellum* became known as the prohibition of aggression and the *jus in bello* as the law of armed conflict reflected in war crimes.[9]

Even though many legal systems have followed some type of codification approach, mostly as derived from Roman law,[10] international criminal law has

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NAHUM RAKOVER, A GUIDE TO THE SOURCES OF JEWISH LAW (1994).

6. *See* A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS 5–15 (M. Cherif Bassiouni ed., 2000) [hereinafter Bassiouni, MANUAL]; *see also* CHARLES FREEMAN, EGYPT, GREECE, AND ROME: CIVILIZATIONS OF THE ANCIENT MEDITERRANEAN (3d ed. 2014); PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (4th ed. 2010). *See generally* ANDREW CLAPHAM & PAOLA GAETA, THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT (2014). *See generally* ARNOLD TOYNBEE, A STUDY OF HISTORY (12 vols., 1961); WILL DURANT & ARIEL DURANT, THE STORY OF CIVILIZATION (11 vols., 1993). *See also* HARRY AUSTRYN WOLFSON, PHILO: FOUNDATIONS OF RELIGIOUS PHILOSOPHY IN JUDAISM, CHRISTIANITY, AND ISLAM (2 vols. 1947); ARISTOTLE, NICOMACHEAN ETHICS (Terence Irwin trans., 2d ed. 2000).

7. *See generally* M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 F. J. INT'L L. 269, 269 (2010). *See also* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 1 (2014). [hereinafter INTRO TO ICL].

8. ST. THOMAS AQUINAS, SUMMA THEOLOGICA (1485). *See generally* KEIICHIRO OKIMOTO, THE DISTINCTION AND RELATIONSHIP BETWEEN JUS AD BELLUM AND JUS IN BELLO (2011). *See also* RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO AND JUS POST BELLUM (Nigel D. White & Christian Henderson eds., 2015).

9. *See generally* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (1977); LARRY MAY, WAR CRIMES AND JUST WAR (2007). *See* M. CHERIF BASSIOUNI, THE STATUS OF AGGRESSION IN INTERNATIONAL LAW FROM VERSAILLES TO KAMPALA – AND WHAT THE FUTURE MIGHT HOLD (forthcoming 2017).

10. Legal history shows that by about the 18th century there were a number of what we today call, families of legal systems. *See generally* RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (2d ed. 1978). They included the family that descended from Roman law, which was essentially a codified system and which had developed a technique with respect to codification. Certainly for its time, the science or technique of legislation developed by Roman law codification was an extraordinary progressive and enlightened system, if for nothing else than that the system, in about 1000 BCE, divided legal subjects into categories such as civil law and criminal law and within them other subdivision applied to different normative aspects regulating individual and social conduct. *See* M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269, 275 (2010). The Roman law science or technique of legislation was adopted in different ways in Italy, France and Germany with the latter developing more cultural characteristics than the Italian, which remained the closest to its historical Roman antecedent and then by the French codification under Napoleon starting with the Napoleonic Code or civil code of 1805. *See generally* Pierre Crabites, *Napoleon and the French Code of Civil Procedure*, 10 LOY. L.J. 3, 3 (1929). The modern codifications in Italy are also from that period but German codifications particularly of criminal law started in the 1500s with modern

emerged in a very haphazard and *ad hoc* manner. With the exception of piracy, which emerged from customary international law,[11] all other international crimes have been established by international conventions. A survey made by this writer reveals that 281 conventions have been passed between 1815 and 2005[12] that address a number of categories of international crimes which this author has also identified and ranked as follows:[13]

(1) Aggression;

(2) Genocide;

(3) Crimes against humanity;

(4) War crimes;

(5) Apartheid;

(6) Enforced disappearance and extra-judicial execution;

(7) Slavery, slave-related practices and the trafficking of human beings;

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versions, particularly procedural codes in Austria and Germany around 1875.

The common law remained very resistant even though David Dudley Fields was among those who urged codification in the 1800s. In English, particularly the presentation of the common law techniques, notwithstanding their disparities and for all practical purposes their *ad hoc* evolutionary nature, was more part of the English culture. These characteristics migrated to the United States with the Pilgrims as of the 1600s and subsequently to Canada, Australia and New Zealand, and then as of the 1800s to those colonies that Great Britain had established on different continents.

By the 1700s, philosophical conceptions of systems of governments and the importance of the law started to emerge in Europe, particularly in the writings of Montesquieu and others. In his seminal work *De l'esprit des lois,* Montesquieu added what would today be considered as a substantive dimension to the rule of law. CHARLES DE SECONDAT MONTESQUIEU, DE L'ESPRIT DES LOIS (1748). European codifications, particularly in the field of criminal law followed that approach and notwithstanding historical and cultural differences European countries, with the exception of England and its common law particularities, consolidated the historical evolution of the codification of the laws based on subject matter, which was quite obviously logical. The criminal law codifications there was also an obvious and commonsense approach to the division of these codes into the different social interests sought to be protected and so every code started with the most serious crimes such as those involving life and then the physical integrity of the person, to be distinguished from another part which dealt with the protection of the perpetrator and economic interests. This idea of the right to life, liberty and security of the person was first articulated in positive law in the English Magna Carta of 1215. It was later found in Bill of Rights to the United States Constitution in 1791.

In time, between the 18th and 20th centuries, these questions were seldom addressed except in some legal systems such as Germany where a tradition of legal dogmatics accepted and influenced not only the content but the science and technique of codification of the criminal law. With all of that said, one would have expected that this cumulative world-wide experience would have benefited ICL. But that was not the case, and there are various explanations for it. All of that does not explain why ICL did not develop a legal system of its own.

11. The earliest known international crime is that of piracy, which emerged out of Roman law and then the naval practices of seafaring nations as of the late 1600s and more particularly in the 1700 and 1800s but that was essentially viewed as it is now, as a matter regarding states. ALFRED P. RUBIN, THE LAW OF PIRACY 4–12 (1998). *See also* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practices*, 42 VA. J. INT'L L. 81, 108–10 (2001).

12. INTRO TO ICL, *supra* note 7, at 221 (2014).

13. *Id.* at 148–49.

(8) Torture and other forms of cruel, inhuman or degrading treatment;

(9) Unlawful human experimentation;

(10) Unlawful manufacturing, identification, possession, use, emplacement, stockpiling and trade of weapons, including nuclear weapons;

(11) Nuclear terrorism;

(12) Mercenarism;

(13) Aircraft hijacking and unlawful acts against international air safety;

(14) Piracy and unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas and continental shelf;

(15) Taking of civilian hostages;

(16) Threat and use of force against internationally protected persons and United Nations Personnel;

(17) Use of explosives;

(18) Cybercrime;

(19) Financing of terrorism;

(20) Unlawful traffic in drugs and related drug offenses;

(21) Organized crime and related specific crimes;

(22) Illicit trade or trafficking in goods;

(23) Destruction and/or theft of national treasures;

(24) Unlawful acts against certain internationally protected elements of the environment;

(25) Unlawful use of the mail;

(26) Unlawful interference with submarine cables;

(27) Falsification and counterfeiting; and,

(28) Corruption and bribery of foreign public officials.

These crimes and their respective rankings are based on the existence of ten penal characteristics in any given international convention.[14] These characteristics are predicated on the social interests sought to be protected and the social harm sought to be prevented. Curiously, all ten of these characteristics are not contained in all 281 conventions, and there is no explanation for this selective diversity in the inclusion of these penal characteristics. There has never been any explanation for the disparity of inclusion of these ten penal characteristics in conventions that proscribe certain forms of what the international community recognizes as constituting international crimes. The disparity in inclusion of the ten penal

14. The ten penal characteristics are: (1) Explicit or implicit recognition of proscribed conduct as constituting an international crime, or a crime under international law, or a crime; (2) Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like; (3) Criminalization of the proscribed conduct; (4) Duty or right to prosecute; (5) Duty or right to punish the proscribed conduct; (6) Duty or right to extradite; (7) Duty or right to cooperate in prosecution, punishment (including judicial assistance); (8) Establishment of a criminal jurisdictional basis; (9) Reference to the establishment of an international criminal court or international tribunal with penal characteristics; (10) No defense of superior orders.

characteristics in all the 281 international criminal conventions is particularly perplexing because it makes no sense, for example to have some but not others of the ten penal characteristics in the nineteen conventions addressing different forms and manifestations of terror-violence.[15] But then, it is equally perplexing to have the international community reject having a comprehensive anti-terrorism convention[16] and instead have multiple overlapping conventions with different parties. That this haphazard legislative approach has been followed for almost a century, while almost every criminal law system in the world has followed a certain technical and legislative policy on the compilation of different categories of crimes, is difficult to explain other than the hidden intentionality of states to create such a haphazard system for political purposes.[17]

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15. M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Perspective*, 43 HARV. INT'L L. J. 83, 83 (2002). *See also* ROBERT A. FRIEDLANDER, TERROR VIOLENCE: ASPECTS OF SOCIAL CONTROL (1982); ROBERT A. FRIEDLANDER ET. AL., TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 1 (1979); ROBERT A. FRIEDLANDER, TERRORISM: A WORLD ON FIRE 4 (1978). *See also* RESEARCH HANDBOOK OF INTERNATIONAL LAW AND TERRORISM (Ben Saul ed., 2014).

16. Draft Comprehensive Convention Against International Terrorism, U.N. Doc. A/59/894, https://www.ilsa.org/jessup/jessup08/basicmats/unterrorism.pdf (last visited Mar. 26, 2017). Mahmoud Hmoud, *Negotiating the Draft Comprehensive Convention on International Terrorism*, 4 J. INT'L CRIM. JUST. 1031, 1031–32 (2006); Gilbert Guillaume, *Terrorism and International Law*, 53 INT'L & COMP. L. Q. 537, 537 (2004).

17. These purposes may include the lack of clarity in the norms of each of the conventions, particularly those applicable to different subjects; the creation of options for governments to become state parties to some and not to others and be able to avail themselves of the opportunity of claiming to be part of international criminal law while in reality avoiding it. An example of the result of such an approach involves the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Hijacking Convention) on airplane hijacking, which provides in article 5 that jurisdiction over crimes covered by the Convention is with the state that has physical custody of the offender, while article 7 also gives jurisdiction to the state of nationality of the perpetrator through article 8's extradition provision. International Convention against the Taking of Hostages, *opened for signature* Dec. 17, 1979, 1316 U.N.T.S. 21931, 206 (entered into force June 3, 1983). The Montreal Hijacking Convention does not specify the priority of article 5 over article 7 or vice versa, nor does it deny it. It therefore creates an ambiguity, which became obvious in the Lockerbie case.

On December 21, 1988, Pan Am 103 airplane exploded over Lockerbie, Scotland. The United States and United Kingdom issued indictments for two Libyan intelligence operatives alleged to have planted explosives on the plane, killing 259 passengers and 11 people in Lockerbie. The two states sought the extradition of the alleged perpetrators from Libya pursuant to the Montreal Hijacking Convention, but Libya argued it had the priority right to prosecute based on the nationality of the two individuals. The UK and US responded arguing that prosecution in Libya would be ineffective because Libyan authorities were involved in the explosion. Libya filed the case with the International Court of Justice, on the matter of whether the duty to prosecute or the duty to extradite was superior. Ultimately, the ICJ never resolved the matter and instead, by agreement of Libya, the United Kingdom and the United States, the case was held in a Dutch military facility, with Scottish judges applying Scottish criminal law. Thus, the questions raised by the situation remained unanswered. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.) Order, 2003 I.C.J. (Sept. 10). *See* INTRO TO ICL, *supra* note 7, at 497–99. Notwithstanding the case and lack of clarity/judgment, the Montreal Hijacking Convention still has not been amended.

Another related example is why we have 19 conventions on anti-terrorism, which are only distinguished by the means utilized by the perpetrator. The result is that if there is an airplane hijacking there are four

Realpolitik is the only explanation for why efforts at the codification of international criminal law, which was undertaken shortly after WWII beginning in 1947, had failed so miserably by 1996.[18] After half a century, the Draft Code of Crimes Against the Peace and Security of Mankind, containing thirteen articles in 1954[19] was reduced only to five crimes: aggression, genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes in 1996.[20] Even so, the draft containing these five crimes was never even put to a General Assembly vote.[21]

It could be said that there has been some limited form of codification of international criminal law in the statutes of international criminal courts established since 1954. This includes the Rome Statute for the International Criminal Court,[22] the statutes of the two *ad hoc* tribunals, the International Criminal Tribunal for the Former Yugoslavia[23] and the International Criminal Tribunal for Rwanda[24] established by the Security Council and the six mixed model tribunals in Cambodia,[25] Sierra Leone,[26] East Timor,[27] Kosovo,[28] Bosnia

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conventions that are applicable but if a diplomat is kidnapped only one convention applies and yet strangely enough, if a private individual is kidnapped, there is yet another convention that applies. 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, *opened for signature* Sept. 14, 1963, 704 U.N.T.S. 218 (entered into force Dec. 4, 1969); 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971); 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation *opened for signature* Sept. 23, 1971, 974 U.N.T.S. 178 (entered into force Jan. 26, 1973); 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, *opened for signature* Feb. 24, 1988, 1589 U.N.T.S. 474 (entered into force Aug. 6, 1989). Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 1035 U.N.T.S. 168 (entered into force Feb. 20, 1977). International Convention against the Taking of Hostages, *opened for signature* Dec. 17, 1979, 1316 U.N.T.S. 206 (entered into force June 3, 1983). The same is true for the distinction between the 1971 Convention on Psychotropic Substances which separates psychotropic drugs from the natural drugs which are covered by the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol. Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 1019 U.N.T.S. 175 (entered into force Aug. 16, 1976). Single Convention on Narcotic Drugs of 1961, *opened for signature* Mar. 30, 1961, 520 U.N.T.S. 151 (entered into force Dec. 13, 1964). Protocol amending the Single Convention on Narcotic Drugs, 1961, 976 U.N.T.S. 3 (Mar. 23, 1972). It is impossible to rationalize all of what, from a legislative policy perspective, has to be irrational unless it is intentional and if so it has to be for political reasons, namely to weaken international criminal law and make its enforcement more difficult.

18. JACKSON NYAMUYA MAOGOTO, WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21ST CENTURY 4 (2004).

19. Draft Code of Offenses Against the Peace and Security of Mankind, 9 U.N. GAOR Supp. (No. 9) U.N. Doc. A/2693 (1954) [hereinafter 1954 Draft Code].

20. Draft Code of Crimes Against the Peace and Security of Mankind, 51 U.N. GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532 (1996) [hereinafter 1996 Draft Code].

21. *Id.*

22. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

23. S.C. Res. 827 (May 25, 1993).

24. S.C. Res. 955 (Nov. 8, 1994).

25. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) (Cambodia), as

and Herzegovina,[29] and Lebanon.[30] But it must be noted, that the two tribunals established by the Security Council were *ad hoc* and that at best, one can consider the definition of crimes contained in their respective statutes as a reflection of customary international law and not as a codification of international criminal law. As to the statutes of the six mixed model tribunals, they are indeed *ad hoc* institutions created by bilateral agreements between the United Nations and the respective governments and they can hardly be said to reflect customary international law, let alone be deemed an exercise in international criminal codification. This only leaves the Rome Statute whose state-parties are, as of 2016, 124 states out of 193 member-states of the United Nations.[31]

Why there has never been a codification of international crimes, which could be divided by subject matter or on any other science or technological basis that would suit a codification undertaking is something that defies legal logic. But it does fit very neatly into a *realpolitik* logic of preventing clarity as a way of reducing enforcement capabilities in order to maximize the opportunities for states to advance their power and wealth interests. This is particularly evident in the new categories of international crimes that deal with illicit trade (which includes everything from trafficking in persons to trafficking Hermès ties, for no clear reason).[32] This brief historical background may explain why the codification efforts of international criminal law have failed so far, as described in the section below.

II. THE CODIFICATION PROCESSES

As described below, the central codification process was within the United Nations and officially proceeded from 1947 to 2010 when it came to its end at Kampala.[33] During that period of time, the United Nations split the process of

amended by NS/RKM/1004/006 (Oct. 27, 2004) (unofficial translation).

26. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137, available at http://hrlibrary.umn.edu/instree/SCSL/SierraLeoneUNAgreement.pdf [hereinafter SCSL].

27. S.C. Res. 1272 (Oct. 25, 1999).

28. S.C. Res. 1244 (June 10, 1999).

29. The War Crimes Chamber was created in 2003 at the Peace Implementation Council Steering Board Meeting and underwent extensive negotiations until its adoption on January 6, 2005. The Court is subject to the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia rather than the new criminal and procedural codes of Bosnia and Herzegovina. The Court also applies the European Charter on Human Rights, ratified by Bosnia and Herzegovina in 2002. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 230 (2011).

30. S.C. Res. 1757 (May 30, 2007).

31. *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties (last visited Nov. 1, 2016).

32. Illicit Trade, OECD, http://www.oecd.org/gov/risk/illicit-trade.htm (last visited Mar. 26, 2017).

33. Dr. jur. h. c. Hans-Peter Kaul, Address on the International Criminal Court: Perspectives after the Kampala Review Conference (June 1, 2011). https://www.icc-cpi.int/NR/rdonlyres/22F9E25C-B4EC-47FF-9F19-

codification into different mandates given to different United Nations mechanisms with the obvious purposes of delaying and hampering the process through bureaucratic means, which ultimately succeeded in wearing out the international community's interest in the subject.[34] The new use of the old Machiavellian[35] technique became bureaucratic and that technique, as well as its attendant allocation financial and personnel resources became the way of controlling international criminal justice.[36] It was the aftermath of WWII that led to the United Nations' efforts to codify international criminal law, and parallel efforts by individual scholars and certain specialized NGOs.[37]

In 1946, the United Nations General Assembly established a committee on international law and its codification[38] and mandated the new committee to "treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal."[39] The following year, 1947, after examining the report of the new committee the General Assembly decided to establish the International Law Commission (ILC)[40] and requested that it "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal" and to prepare a Draft Code of the Offenses Against the Peace and Security of Mankind.[41]

The newly established International Law Commission formed a subcommittee, appointed special rapporteur Jean Spiropulous and began drafting a draft code in 1949.[42] This committee worked on the 1950 Draft Code and

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34. SIRACUSA GUIDELINES FOR INTERNATIONAL, REGIONAL AND NATIONAL FACT-FINDING BODIES 65–67 (M. Cherif Bassiouni & Christina Abraham eds., 2013) [hereinafter Siracusa Guidelines].

35. NICCOLÒ MACHIAVELLI, THE PRINCE 1513 (N.H. Thompson trans., Dover Publications 1992).

36. Siracusa Guidelines, *supra* note 34.

37. The 1866 Outlines of an International Code by David Duddley Fields inspired the "Peace Society," a group of United States jurists, to seek to develop an international code of crimes beginning in 1872. While the desire to bring about peace through support for an international criminal law system has certainly long existed throughout the world, it was not until the events of WWI that any tangible realization was seen. Following the end of WWI, in 1924 international jurists reorganized the Association Internationale De Driot Pénal or International Association of Penal Law (AIDP), originally founded in 1889 in Vienna, which played an invaluable historic role in the establishment of the International Criminal Court and continues to do so with respect to strengthening the international criminal justice. Pierre Bouzat, Introduction, in M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND STATUTE FOR AN INTERNATIONAL CRIMINAL, XII (1987) [hereinafter BASSIOUNI, DRAFT CODE & STATUTE].

38. G.A. Res. 94 (I) (Dec. 11, 1946).

39. *Id.*

40. G.A. Res. 174 (III) (Nov. 21, 1947).

41. G.A. Res. 177 (Nov. 21, 1947).

42. *Summary Records and Documents of the First Session including the report of the Commission to the General Assembly,* 1 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/13 and Corr. 1–3.

submitted its first report in 1950.[43] The contents of the 1950 Draft Code remained limited to the crimes referred to in its title, namely those that affect the peace and security of mankind.[44] The 1950 Draft Code and its successors limited criminal responsibility to individuals, excluding criminal responsibility for organizations and states.[45]

Concurrently, the international community took steps towards formulating a draft statute for establishment of a permanent international criminal court when the General Assembly requested that the ILC "study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions", and, "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice."[46] The ILC began by appointing another special rapporteur, Ricardo J. Alfaro, who also submitted a first report to the International Law Commission in March of 1950.[47] Alfaro's report correctly noted that both a code of international crimes and a statute for an international court were needed to supplement one another, but this drafting logic largely went unheeded during the following decades as the work on a draft code and draft statute was assigned to different committees.[48] In 1950, another special rapporteur, Emil Sandström, was appointed to further study the development of an international criminal court,[49] but the two rapporteurs differed on whether the time was right for the establishment of such a court.[50] With the exception of France, the major powers of the time did not support the establishment of an international court, however the work continued as no state wanted to be blamed for interfering with the establishment.[51] In that same year, a

43. Jean Spiropoulous (Special Rapporteur), *Draft Code of Offenses Against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/25 (1950).

44. COMMENTARIES IN THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND 2 (M. Cherif Bassiouni ed., 1993) [hereinafter BASSIOUNI, COMMENTARIES].

45. *Id.* at 3.

46. G.A. Res. 260 (III) (Dec. 9, 1948). This request was made along with the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide.

47. *Report of the International Law Commission on Question of International Criminal Jurisdiction*, U.N. GAOR, 5th Sess., U.N. Doc. A/CN.4/15 (1950).

48. *See* Ricardo J. Alfaro (Special Rapporteur), *Report of the Question of International Criminal Jurisdiction*, U.N. Doc. A/CN.4/15 and Corr.1 (1950).

49. Int'l Law Comm'n, Rep. on the Question of International Criminal Jurisdiction, U.N. GAOR 5th Sess., U.N. Doc. A/CN.4/20 (1950).

50. *See* M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: Introduction, Analysis and Integrated Text 56–57 (2005) [hereinafter BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC]; 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT 18 (M. Cherif Bassiouni & William Schabas eds. 2nd rev. ed., 2 vols. 2016) [hereinafter BASSIOUNI & SCHABAS].

51. The desire to avoid being blamed for the failure of the ICL movement was particularly acute given that the Nuremberg and Tokyo Tribunals were established only a few years prior. States feared that that by publically changing their stance of the establishment of international criminal tribunals they would give more credence to the claims that the post-WWII tribunals were a form of victor's vengeance. BASSIOUNI, COMMENTARIES, *supra* note 44, at 6. *See also* Bert V.A. Röling, *The*

committee was established by the General Assembly for the purpose of drafting a statute for the establishment of an international criminal court.[52] The establishment of such a committee, separate and apart from the committee convened to draft the Draft Code of Offenses Against the Peace and Security of Mankind, was essentially dilatory as there was no valid justification to spilt substance from process, though admittedly the substantive codification included more crimes than those that were to be subject to the eventual jurisdiction of an international criminal court. The latter would presumably have jurisdiction over the gravest international crimes as: aggression, genocide, crimes against humanity and war crimes, as was ultimately the case with the International Criminal Court.[53]

In 1951, the committee for the Draft Statute, comprised of representatives of seventeen states, finished its task and produced the 1951 Draft Statute, structurally modeled in part after that of the International Court of Justice.[54] The Draft Statute extended the court's jurisdiction only to heads of states, and not to other government officials and did not reference state responsibility under international criminal law.[55] The exclusion of state criminal responsibility was the drafter's response to concerns over the acceptance of the 1951 Draft Statute by major powers.[56] But even despite the attempt to alleviate the concerns of the major powers, politics indicated that the project had no chance of acceptance and was politically premature.[57] But western states did not want to assume political responsibility for the demise of an international criminal court within 5 and 6 years of the end of the International Military Tribunal (IMT) and International Military Tribunal for the Far East (IMTFE) and so the Draft Statute committee's mandate was extended.[58] After some change in membership, the committee continued to work on the statute,[59] while another committee worked on the Draft Code of Offenses.

In 1953, the committee for the Draft Statute produced a revised Draft Statute text, the 1953 Draft Statute, which was submitted to the General Assembly.[60] The revision was the result of political pressure by states and the committee's desire to

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Nuremberg and Tokyo Trials in Retrospect, *in* 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 590 (M. Cherif Bassiouni & Ved P. Nanda eds., 2 vols. 1972); M. Cherif Bassiouni, *Nuremberg Forty Years Later*, 18 CASE W. RES. INT'L L. 261, 261–62 (1986).

52. G.A. Res. 498 (V) (Dec. 12, 1950). *See also Report of the Committee on International Criminal Court Jurisdiction*, U.N. GAOR, 7th Sess., Supp. (No. 11,), U.N. Doc. A/2136 (1952).

53. *See* Rome Statute, *supra* note 22.

54. 1945 Statute of the International Court of Justice, *opened for signature* June 26, 1995, 33 U.N.T.S. 933 (entered into force Oct. 24, 1945). *See* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 50, at 57; *see* BASSIOUNI & SCHABAS, *supra* note 50, at 64.

55. Committee on International Criminal Jurisdiction, *Draft Statute For An International Criminal Court*, 46 AM. J. INT'L L. 1, 36–38 (1952). BASSIOUNI, COMMENTARIES, *supra* note 44, at 9.

56. BASSIOUNI, COMMENTARIES, *supra* note 44, at 9.

57. *See id.* at 59–60.

58. G.A. Res. 486 (V) (Dec. 12, 1950).

59. *Id.* INTRO TO ICL, *supra* note 7, at 580–81.

60. *Report of the Committee on International Criminal Jurisdiction*, U.N. GAOR, 7th Sess., Supp. (No. 12,), at 21, U.N. Doc. A/26645 (1954).

produce a draft that was more politically acceptable to major powers.[61] Therefore, the resulting 1953 Draft Statute limited the court's jurisdiction and allowed state parties to retain more control.[62] Upon receiving the 1953 Draft Statute, the General Assembly found it necessary to first consider the International Law Commission committee's work on the Draft Code of Offenses, which was not yet completed. The General Assembly thus tabled the consideration of the Draft Statute until the Draft Code of Offenses was completed.[63]

As to the work of the committee on the Draft Code of Offenses, in December 1952, the General Assembly removed defining "aggression" from the jurisdiction of the committee for the Draft Code of Offenses and established a new special committee tasked with defining "aggression,"[64] thus creating the third parallel codification track. The special committee to define aggression, consisting of government representatives rather than independent experts,[65] was to "draft definitions of aggression or draft statements of the notion of aggression" to be submitted at the General Assembly's ninth session in 1954.[66]

The political strategy was to truncate the comprehensiveness of the undertaking by having three separate bodies with different compositions and different mandates, meeting separately in different venues and at different times, all without any coordination. This eventually produced multiple texts that would necessarily have gaps and overlaps making them unsusceptible to separate adoption.

What follows is the extraordinary sequence of events that evidence how successful the truncated approach was as of 1950 to date.

A year after the General Assembly tabled considerations of the 1953 Draft Statute for an international criminal court because the Draft Code of Offenses was not complete, the ILC's 1954 Draft Code of Offenses was completed and submitted to the General Assembly.[67] The 1954 Draft Code consisted of five articles, listing thirteen separate international crimes.[68] But it lacked a definition of

61. INTRO TO ICL, *supra* note 7, at 581 n.200.

62. *Id.* at 581–82.

63. G.A. Res. 898 (IX), U.N. GAOR, 9th Sess., Supp. No. 21 at 50, U.N. Doc. A/2890 (1954); *see* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 50, at 58–9; *see* BASSIOUNI & SCHABAS, *supra* note 50, at 65.

64. G.A. Res. 688 (VII) (Dec. 20, 1952). *See also* INT'L L. COMM'N, *Summaries of the Work of the Int'l L. Comm'n: Question of Defining Aggression* (2015), http://legal.un.org/ilc/summaries/7_5.shtml#a5 [hereinafter INT'L L. COMM'N].

65. M. Cherif Bassiouni, *Challenges to International Criminal Justice and International Criminal Law*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW 385-6 (William Schabas ed. 2016).

66. G.A. Res. 688 (VII), at 2 (Dec. 20, 1952).

67. *See* Third Report Relating to a Draft Code of Offenses Against the Peace and Security of Mankind, U.N. GAOR, 6th Sess., U.N. Doc. A/CN.4/85 (1954). *See* D.H.N. Johnson, *The Draft Code of Offenses Against the Peace and Security of Mankind*, 4 INT'L COMP. L.Q. 445 (1955); *see generally* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 50, at 58-60; *see* BASSIOUNI & SCHABAS, *supra* note 50, at 65.

68. *See* 1954 Draft Code, *supra* note 19. *See also* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC,

aggression due to the General Assembly's decision to remove defining the crime from the committee's purview. Therefore, the General Assembly tabled the 1954 Draft Code until aggression was defined. The domino effect worked: the 1953 Draft Statute for the Court was tabled because the Code of Offenses was not completed, then when the committee on the Code completed its work, the 1954 Draft Code was tabled because aggression was not defined. And that left only the definition of aggression as the last barrier against having to adopt a Code and establishing a Court. And that process also followed an amazingly political, torturous course.

As stated above, 1952, the General Assembly established a special committee to define aggression, which did not complete its task until 1974.[69] Between the special committee's establishment in 1952 and 1974 when it completed its task, there were four special committees that worked on the definition of aggression.[70] The first special committee, consisting of fifteen members, met from August 24th to September 21st, 1953 at the United Nations Headquarters in New York while the committees for the Draft Code met at Geneva to work on the text.[71] A number of texts aimed at defining aggression were produced.[72] The special committee unanimously decided not to put them to a vote but rather to submit them for comments from the General Assembly and Member states – another delaying tactic.[73] The second committee on aggression again met at UN Headquarters in New York three years later in 1956.[74] Why there was a three year hiatus is not too difficult to explain – it was about delaying the outcome. But again the 1956 committee on aggression did not adopt a definition of that crime and yet in another delaying tactic it submitted another report to the General Assembly summarizing various matters, including draft definitions.[75] In 1957, the General Assembly took note of the special committee's report and again mandated a third special committee to study the replies of Member States to the report "for the purpose of determining when it shall be appropriate for the General Assembly to consider again the question of defining aggression."[76] The third special committee met only four times over a period of eight years, namely in 1959, 1962, 1965 and 1967 each time bouncing the question of aggression to the General Assembly who in turn sent it back to the committee in a ping-pong like game. But these multiple United Nations reports created the impression of movement and even progress- and so the world's public opinion was politically duped.

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supra note 50, at 58–60. *See* BASSIOUNI & SCHABAS, *supra* note 50, at 65.

69. G.A. Res. 3314 (XXIX), art. 2, 3, 4 (Dec. 14, 1974) [hereinafter 1974 Res. Defining Aggression]; INT'L L. COMM'N, *supra* note 64.

70. INT'L L. COMM'N, *supra* note 64.

71. U.N. International Law Commission, Summaries of the Work of the International Law Commission: Question of Defining Aggression (July 15, 2015), http://legal.un.org/ilc/summaries/7_5.shtml.

72. *Id.*

73. *Id.*

74. *Id.*

75. G.A. Res. 1181 (XII), at 2–3 (Nov. 29, 1957).

76. *Id.*

This lasted until December 1967, when the delaying political games began to wear quite thin, the General Assembly, by resolution, established a fourth Special Committee on the Question of Defining Aggression, stating: "recognizing 'that there is a widespread conviction of the need to expedite the definition of aggression."[77] This fourth Special Committee, comprised of thirty-five Member States representatives held one session each year from 1968 until 1974,[78] yet claiming, "to consider all aspects of the question so that an adequate definition of aggression may be prepared."[79] Finally, in 1974, the fourth Special Committee adopted a draft definition of "aggression" and recommended that the General Assembly adopt it.[80] The definition was adopted by the General Assembly on December 14, 1974,[81] by consensus.

The twenty-two yearlong effort to define "aggression" from 1952 to 1974 resulted in a consensus resolution (not by a vote, so that no state should be held to remember it).[82] More importantly, the resolution was never relied upon in any Security Council decision, the body prescribed in the U.N. Charter under article 39 to deal with "aggression."[83] This consistent negative practice leads to the conclusion that the concept of "aggression" as reflected in the U.N. Charter has fallen into *désuétude*.[84]

1974, in addition to being the year in which a definition of aggression was finally adopted, was also the year that the AIDP elected this writer as the Secretary-General of the Association,[85] which was the starting point of the creation of an alternative Draft Code of Crimes in 1980.[86] To support the United Nations' processes in the drafting of a code of crimes and a statute for the establishment of an international criminal court, this writer, with the support of a number of colleagues in the field of international criminal law, undertook to develop an

77. G.A. Res. 2330 (XXII) (Dec. 18,1967).

78. INT'L L. COMM'N, *supra* note 64.

79. G.A. Res. 2330 (XXII) (Dec. 18,1967).

80. G.A. Res. 3314 (XXIX) (Dec. 19 1974), *supra* note 69.

81. *Id.*

82. G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. (No. 31), at 142, U.N. Doc. A/9631 (1974).

83. U.N. Charter, art. 39.

84. A common law concept, borrowed from French law known as *désuétude*, meaning fallen into disuse, refers to the notion that the consistent absence of use and application of a legal norm renders it inapplicable or obsolete. While the court has avoided pronouncing on the issue, the concept has been argued in a number of cases before the International Court of Justice. *See generally* Case Concerning Legality of Use of Force (Yugo. v. Belg.), Preliminary Objections of Belg., 134–35, ¶¶ 413, 414, 416 (July 5, 2000); Nuclear Tests (Austl. v. Fr.), Provisional Measure, Oral Arguments on the Request for the Indication of Interim Measures of Protection (May 1973), http://www.icj-cij.org/docket/files/58/9445.pdf. *See also* M. CHERIF BASSIOUNI, THE STATUS OF AGGRESSION IN INTERNATIONAL LAW FROM VERSAILLES TO KAMPALA – AND WHAT THE FUTURE MIGHT HOLD (forthcoming 2017).

85. *Id.*

86. M. Cherif Bassiouni, *International Criminal Court: Ratification And National Implementing Legislation*, 71 REVUE INTERNATIONALE DE DROIT PÉNAL 1-2 (2000); M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980) [hereinafter 1980 Draft Code].

alternative draft code of international crimes entitled *International Criminal Law: A Draft International Criminal Code,*[87] as well as a later draft statute for an international criminal court. To start this process, this writer began to draft a code of international crimes to be submitted to experts in the field of international criminal law in 1979. But this parallel effort led to nowhere and the United Nations system simply accepted it as another NGO contribution.

Between 1974 and 1978, the United Nations had to tackle another problem. In 1974 aggression was defined and voted upon by the General Assembly.[88] Consequently, the 1954 Draft Code should have presumably been back on the General Assembly's agenda since it was then tabled because aggression had not yet been defined. However, that did not happen until 1978,[89] despite efforts between 1974 and 1978 by a number of governments and NGOs to get the issue back on the General Assembly's agenda.[90] In 1978, the Draft Code was exhumed,[91] and on December 16, 1978, the General Assembly invited Member States and IGOs to submit their comments on the 1954 Draft Code, but it produced few comments as states had mostly forgotten about that initiative, but more to the point, any comments in 1978 about a 1954 text had to be negative due to the passage of time and changing circumstances. Consequently, most states abstained, some seeking a way to revive that historic effort which had survived the Cold War. Two years later, the General Assembly again reiterated its request that states submit their comments in December 1980.[92]

During this period, developments were made on the establishment of an international criminal court, on a different front. In 1979, this writer was commissioned by the United Nations Commission on Human Rights, *Ad Hoc* Working Group on Southern Africa to draft a statute for a specialized international criminal court for the implementation and enforcement of the *Apartheid* Convention.[93] While working on the draft, this writer concurrently continued to work on an alternative draft a code of international crimes with the support of the AIDP.[94] That same year, this writer and the AIDP committees completed their

87. *See* 1980 Draft Code, *supra* note 86.

88. 1974 Res. Defining Aggression, *supra* note 69.

89. *See* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 50, at 59–60; *see* BASSIOUNI & SCHABAS, *supra* note 50, at 66.

90. *Id.*

91. *Id.* However, the Draft Statute on the establishment of an international criminal court, tabled in 1953, remained mysteriously tabled and buried.

92. INT'L L. COMM'N, *supra* note 64.

93. The *Apartheid* Convention entered into force in 1976, but at the time there was very little political will to implement the Convention's article V jurisdictional provision which calls for the prosecution of violators by an international criminal tribunal, "Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction." International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. V. (July 18, 1976), 1050 U.N.T.S. 244. *See also* 1980 Draft Code, *supra* note 86.

94. *See* 1980 Draft Code, *supra* note 86.

work on an alternative draft code of crimes in July 1979, and submitted the draft to the Sixth United Nations Congress on Crime Prevention and the Treatment of Offenders in Caracas, Venezuela in August/September of that year.[95] In fact, less than twenty-four hours after this writer presented the alternative draft code of crimes to the UN Congress in Caracas, this writer presented the draft statute for an international criminal tribunal to implement the *Apartheid* Convention's article 6 to the members of the *Ad Hoc* Working Group in Geneva,[96]in fulfillment of his appointment.[97] The alternative code of crimes was also published in 1980 as *International Criminal Law: A Draft International Criminal Code* (1980 Draft Code), which contained twenty international crimes codified on the basis of then existing international conventions.[98]

In regards to the codification of international criminal law within the United Nations system, the *coup de grâce* came in 1982. That year, the International Law Commission appointed Doudou Thiam as Special Rapporteur for the topic "Draft Code of Offences Against the Peace and Security of Mankind" and established a working group on the same topic.[99] The Special Rapporteur, who was ill-prepared for such a task, produced a flawed text in 1991 which was highly criticized as both exceeding the mandate of the General Assembly as well as overreaching and ambiguous to the point of violating principles of legality.[100] Due to criticism of the report, it was revised and reduced to five crimes that were adopted by the ILC in 1996. [101] The 1996 Draft Code reduced the twelve crimes contained in the 1991 Draft Code to only five crimes, defined by reference to previous definitions. Genocide was defined according to the 1948 Convention, war crimes by reference to the Geneva Conventions and customary international law, and crimes against humanity was a blend between article 5 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and article 3 of the International Criminal Tribunal

95. *See* BASSIOUNI, COMMENTARIES, *supra* note 44, at 19.

96. *Id.* at 19–20.

97. M. Cherif Bassiouni & Daniel H. Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523, 523 (1980-1981).

98. *See* BASSIOUNI, COMMENTARIES, *supra* note 44, at 19–20. While the draft was discussed at an ancillary meeting of the Congress, no further action was taken on it. *See also* M. Cherif Bassiouni, *International Criminal Law: A Draft International Criminal Code and Statute for an International Criminal* (1987). However, this writer and his colleagues were not dissuaded and continued to push forward with their contributions to the codification of the international criminal law. The 1980 Draft Code was further supplemented by an alternative Draft Statute for the establishment of a permanent international criminal court in 1987 and published under the title, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal. Id.*

99. Rep. of the International Law Commission on the work of its thirty-fifth session, 3 May- 22 July 1983, Official Records of the General Assembly, Thirty-eighth session, Supplement No. 10, at 13, U.N. Doc. A/38/10 (1983).

100. *See* BASSIOUNI, COMMENTARIES, *supra* note 44, at viii. *See also* INTRO TO ICL, *supra* note 6, at 139–42.

101. M. Cherif Bassiouni, INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT, Ch. 2, 121 (3rd ed. 2008).

for Rwanda (ICTR).[102] Despite the adoption of this simplistic text by the ILC in 1996, it was never voted on by the General Assembly.[103]

In 1989, another interesting political maneuver played an important role in the bureaucratic mandate gamesmanship of the United Nations. This occurred in connection with the General Assembly's Special Session on the problem of drug trafficking. During that session the late President, then Prime Minister Arthur N. Robinson[104] of Trinidad and Tobago proposed the establishment of a specialized international criminal court to prosecute persons engaged in drug trafficking.[105] A similar effort was undertaken by the AIDP in 1937 to have a special international criminal court for terrorism as a protocol to the League of Nations Terrorism Convention.[106] The General Assembly in 1989 very deftly requested the International Law Commission to examine such a proposal.[107] The referral to the ILC was ambiguous and intended only to avoid having to deal with this question.[108] The ILC responded by producing a short report in 1990, that posed

102. Rep. of the International Law Commission on the work of its forty-eighth session, 6 May- 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No. 10, U.N. Doc. A/51/10 (1996).

103. Bassiouni, *supra* note 101, at 121.

104. As one who advised the late president Robinson, and who was also a very dear personal friend, I relied on the 1937 Protocol to the League of Nations Convention for the Prevention and Punishment of Terrorism, which had been elaborated on by distinguished jurists who were then at the League of Nations. One of them Vespasian Pella, who represented his country, Romania, at the League, was also president of the International Association of Penal Law, which had been a long-term proponent of establishing a permanent international criminal court. Pella and others proposed a protocol to the 1937 Terrorism Convention to establish a specialized international criminal court to enforce the Convention. Robinson and I thought that this could also work for drug offenses, even though we were skeptical of the merits of having a permanent international criminal court for one category of crimes, and one which was not amongst the most serious international crimes but we thought it was a way of opening the door to the UN revisiting the question after the long history of failure described above. The 1937 Protocol for the creation of an international criminal court was never adopted, neither was the draft statute for the creation of an international criminal court to enforce the *Apartheid* Convention, which I drafted as the UN's independent expert to the Commission on Human Rights' sub-commission on Southern Africa. Study On Ways And Means Of Insuring The Implementation Of International Instruments Such As The International Convention On The Suppression And Punishment Of The Crime Of *Apartheid*, Including The Establishment Of The International Jurisdiction Envisaged By The Convention, U.N. Doc. E/CN.4/1426 (Jan. 19, 1981). Commission of Human Rights, Interpretation of the International Covenant of the Suppression and Punishment of the Crime of *Apartheid*, U.N. Doc. E/CN.4/1426, Jan. 19, 1981. Robinson was also an active member in the Foundation for the Establishment of an International Criminal Court, organized by the late Robert Kurt Woetzel.
See generally M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991); M. Cherif Bassiouni & Daniel H. Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523, 523 (1980-1981).

105. G.A. Res. 44/39 (Dec. 4, 1989).

106. *See* Convention for the Prevention and Punishment of Terrorism, League of Nations, Nov. 16, 1937 (discussion of 1937 terrorism convention and attempt to create a specialized international criminal court).

107. G.A. Res. 44/39, ¶ 1 (Dec. 4, 1989).

108. BASSIOUNI, DRAFT CODE & STATUTE, *supra* note 37, at 11. G.A. Res. A/RES/S-17/2, ¶ 82 (Feb. 23, 1990): The mandate stated:

more questions than it answered, but it paved the way for the ILC's initiative in 1994.[109]

The ILC completed its report as mandated by the General Assembly's special session on drugs and submitted it to the 45th session of the General Assembly,[110] but its report was not limited to the issue of drug trafficking, and it was received favorably by the General Assembly, which encouraged it to continue its work.[111] The tables were suddenly reversed as the political climate in the international community favored the establishment of an international criminal court. After all, that was far better a prospect to deal with in *realpolitik* terms than with an enforceable definition of aggression. Thus, the ILC went from a mandate limited to drug trafficking to one encompassing the drafting of a comprehensive draft for an international criminal court.[112] The ILC prepared a preliminary report in 1992,[113] which was favorably received by the General Assembly, and then the ILC produced a comprehensive report in 1993,[114] which was modified in 1994.[115]

In 1994, the International Law Commission's report on a draft statute for the establishment of an international criminal court, headed by special rapporteur James Crawford, was submitted to the General Assembly, which in 1995 had set up the *Ad Hoc* Committee for the Establishment of an International Criminal Court.[116] The *Ad Hoc Committee* met in April and August of 1995 to review the

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"Since the International Law Commission has been requested to consider the question of establishing an international criminal court or other international trial mechanism with jurisdiction over persons alleged to be engaged in illicit trafficking in narcotic drugs across national frontiers, the Administrative Committee on Co-ordination shall consider, in its annual adjustments to the United Nations system-wide action plan on drug abuse control requested by the General Assembly in its resolution 44/141 of 15 December 1989, the report of the Int'l Law Commission on the question."
Adoption of a Political Declaration and Global Programme of Action, Bureau of the Ad Hoc Committee of the Seventeenth Special Session of the General Assembly, ¶ 80 U.N. Doc. VA/S-17/AC.1/L.2 (1990) *quoted in* BASSIOUNI, DRAFT STATUTE, *supra* note 10, at 11 n.35.

109. Eighth Report on the Draft Code of Crimes Against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur, at 36, U.N. Doc. A/CN.4/430/Add.1 (1990). *See also* BASSIOUNI, DRAFT CODE & STATUTE, *supra* note 37, at 1.

110. Rep. of the International Law Commission on the work of its forty-second session, 1 May- 20 July 1990, Official Records of the General Assembly, Forty-fifth session, Supplement No. 10, at 8, U.N. Doc. A/45/10(1990).

111. *See* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 44, at 62–3; *see* BASSIOUNI & SCHABAS, *supra* note 44, at 68–70.

112. *Id.*

113. Rep. of the International Law Commission on the work of its forty-fourth session, 4 May- 24 July 1992, Official Records of the General Assembly, Forty-seventh session, Supplement No. 10, U.N. Doc. A/47/10 (1992). This writer's draft statute for an international criminal court to prosecute violators of the *Apartheid* Convention served as a model for the ILC's 1993 Draft Statute for an international criminal court. *See* INTRO TO ICL, *supra* note 6, at 584–85, 584 n.217.

114. *See* Revised Report of the Working Group on the draft statute for International Criminal Court- reproduced in document A/48/10, A/CN.4/L.490 and Add. 1 (1993)

115. Report of the International Law Commission on the work of its forty-sixth session, 2 May- 22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10, U.N. Doc. A/49/10 (1994); Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 PACE INT'L L. REV. 121, 138–139 (1994).

116. The mandate of the Ad Hoc Committee was: "To review the major substantive and

ILC's draft statute and to consider preparations for the convening of a newly mandated United Nations' body.[117]

The *Ad Hoc* Committee produced its report in 1995,[118] which became the basis for the General Assembly's establishment of the 1996 Preparatory Committee on the Establishment of an International Criminal Court (PrepCom).[119] The PrepCom's mandate was explicit and goal-oriented and was subsequently extended by the General Assembly to 1998, in order to produce a consolidated text of a convention, statute and annexed instruments to submit to a Diplomatic Conference to be held in Rome from June 15th - July 17th, 1998.[120] Despite many obstacles,[121] in April 1998, PrepCom produced a 173-page text containing 116 articles, which was the text that the Diplomatic Conference held in Rome, used to adopt the statute of the International Criminal Court on July 17, 1998.[122]

Yet throughout the work of the PrepCom and those delegates at the Rome Diplomatic Conference there was no agreement on defining aggression. The draft text produced by the PrepCom included three possible options for the definition,[123] but none were included in the final draft of the Rome Statute. Thus, at the time the Rome Statute entered into force in 2002, the International Criminal Court could not hear prosecutions for the crime of aggression as it was not yet defined nor were its jurisdictional conditions set out.[124] Those opposed to aggression won again by delaying the definition, even hoping that it would have never been achieved. But a few committed states and NGOs were not about to let go.[125] But it took a few years

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administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries." Rep. of the International Law Commission of the Work of its Forty-sixth Session, ¶ 2, U.N. Doc. A/C.6/49/L.24 (1994).

117. The 1991 text was subsequently redrafted by the ILC. *See* Draft Code of Crimes Against the Peace and Security of Mankind: Titles and Texts of Articles adopted by the Commission on its forty-eight session., reproduced in YearbookFalse1996, vol. II (Part Two), para 50., U.N. Doc A/CN.4/L.532 (1996) rev'd by U.N. Doc. A/CN.4L.532 [and Corr. 1 and 3]. *See* BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 50, at 71. BASSIOUNI & SCHABAS, *supra* note 44, at 71–2.

118. Rep. of the Ad Hoc Committee on the Establishment of an International Criminal Court, supp. No. 22, U.N. Doc. A/50/22 (1995).

119. G.A. Res. A/RES/50/46, ¶2 (Dec. 11, 1995).

120. G.A. Res. A/RES/51/207 (Dec. 17, 1997).

121. M. Cherif Bassiouni, *Observations Concerning the 1997-98 Preparatory Committee's Work*, 25 DENV. J. INT'L L. & POL'Y 397, 397–400 (1997).

122. Draft Report of the Preparatory Committee, at art. 5, U.N. Doc. A/AC.249/1998/L.16 (Apr. 2, 1998).

123. *Id.* art. 5.

124. Rome Statute, *supra* note 22, art. 5(2). *See generally* COALITION FOR THE INT'L CRIM. CT, Davis, Cale, Forder, Susan, Little, Tegan, and Dali Cvek, *The Crime of Aggression and the International Criminal Court*, 17 THE NATIONAL LEGAL EAGLE 1, 1–2 (Autumn 2011), http://www.iccnow.org/documents/agression.pdf (last visited Aug. 23, 2016).

125. It must be said, that Kampala would not have taken place had it not been for the concerted efforts of a number of persons, chief among them were Ambassador Zeid Ra'ad Zeid Al-Hussein of Jordan, who served as President of the Assembly of State Parties (ASP), and Ambassador Christian Wenaweser of Liechtenstein, who at that time who was also the president of the ASP. A number of NGOS and other individuals representing civil society organizations and academia were also very

since the Rome Statute was adopted in Rome in 1998 for Kampala to happen in 2010, when the ICC's Review Conference for the Rome Statute, adopted a definition of aggression.[126] Yet, even with a definition, the International Criminal Court cannot yet hear cases regarding the crime of aggression, despite the Kampala Amendments having been ratified by the requisite thirty State Parties.[127] However, more importantly, the Amendments will not enter into force, giving the Court jurisdiction over the crime of aggression, until after January 1, 2017 when a decision is made by State Parties to activate jurisdiction and will apply only to the state parties that have opted in.[128] Aggression as defined in the ICC's Kampala

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active and effective including Benjamin F. Ferencz. The ICC Coalition also deserves recognition.

126. *The Crime of Aggression and the International Criminal Court*, *supra* note 124.

127. Status of Ratification and Implementation, THE GLOBAL CAMPAIGN FOR RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS ON THE CRIME OF AGGRESSION, http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/ (last visited Sept. 23, 2016). As of September 1, 2016 the following thirty states have ratified the Kampala Amendments: Andorra, Austria, Belgium, Botswana, Costa Rica, Croatia, Cyprus, Czechia, El Salvador, Estonia, Finland, Georgia, Germany, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Norway, Poland, Samoa, San Marino, Slovakia, Slovenia, Spain, Switzerland, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, and Uruguay.

128. Rome Statute, *supra* note 22, art. *8 bis*, 15 *bis*, and 15 *ter*. The amendments are as follows:
Article 8 *bis*: Crime of Aggression
1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein. Rome Statute, *supra* note 19, art. 8*bis*.
Article 15 *bis*: Exercise Of Jurisdiction Over The Crime Of Aggression (State Referral, Proprio Motu)

Amendments cannot yet be deemed part of customary international law. It is only enforceable with respect to those state parties to the Rome Statute who have specifically opted into it. Thus, despite the immense strides taken in the codification of international criminal law and the establishment of a permanent international criminal tribunal, the effects of the *ad hoc* or haphazard approach remain.

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1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5. *Id.* art. 15 *bis*.
Article 15 *ter*: Exercise Of Jurisdiction Over The Crime Of Aggression (Security Council Referral)
1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5. *Id.* art. 15 *ter*.

III. CODIFICATION EFFORTS

As evidenced with respect to defining and codifying the crime of aggression, *realpolitik* often serves as an obstacle to efforts for the development and codification of international criminal law. This is evident in the intentional splintering of codification efforts regarding aggression and saw success in stalling the process for twenty-two years. This is also clear in the attempts made, both within the United Nations system and outside of it, to draft an internationally agreed upon code of international crimes. But some efforts are more successful than others.

A. Comparison of 1974 and Kampala Definitions of Aggression

As detailed above, in 1952 the United Nations General Assembly established a special committee with the mandate of defining the crime of aggression, however, it was not until 1974 that the task was complete.[129] The committee was heavily criticized for taking twenty-two years to define the crime but in retrospect its efforts were not without impact, as the 2010 Kampala Amendments providing the International Criminal Court with jurisdiction over the crime of aggression, were adopted in accordance with the definition of the crime adopted by the General Assembly in 1974.[130]

The definition of the crime of aggression adopted by General Assembly resolution in 1974 is as follows:

> Article 2: The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.
>
> Article 3: Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
>
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
>
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
>
> (c) The blockade of the ports or coasts of a State by the armed

129. G.A. Res. 688 (VII), at 63 (Dec. 20, 1952).

130. "Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression..." Rome Statute, *supra* note 22, art. 11, *8bis(2)*.

> forces of another State;
>
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
>
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
>
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
>
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.
>
> Article 4: The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.[131]

As evidenced by the text of the Kampala Amendment above in section two,[132] the definition adopted in 2010 refers to the 1974 General Assembly resolution adopting the definition of aggression,[133] and the enumerated acts constituting aggression follow the 1974 definition verbatim.[134] Both definitions also explicitly refer to acts of aggression as violations of the United Nations Charter,[135] and both definitions apply regardless of any declaration of war.[136] There are, however, two important differences between the definitions, namely individual criminal responsibility and the role of the United Nations Security Council. The Kampala Amendments explicitly provides for individual criminal responsibility, stating that conduct "by a person in a position effectively to exercise control over or to direct the political or military action of a State," may constitute an act of aggression.[137] There is no comparable provision in the 1974 definition of aggression. Also, differentiating the two definitions is the role of the Security Council in determining acts that constitute aggression. Under the 1974 definition, the enumerated acts are not exhaustive and the Security Council may determine other acts constituting aggression.[138] The Kampala definition does not contain a similar understanding.

131. 1974 Res. Defining Aggression, *supra* note 69.

132. Rome Statute, *supra* note 22, art. 8*bis* ¶ 2.

133. 1974 Res. Defining Aggression, *supra* note 69.

134. *Compare* 1974 Definition, *supra* note 69, art. 3, ¶¶ (a)-(g) *with* Rome Statute, *supra* note 22, art. 8*bis* ¶¶ 2(a)-(g).

135. *See* 1974 Res. Defining Aggression, *supra* note 69, art. 2; Rome Statute, *supra* note 22, art. 8*bis* ¶ 1.

136. *See* 1974 Res. Defining Aggression, *supra* note 69, art. 3; Rome Statute, *supra* note 22, art. 8*bis* ¶ 2.

137. Rome Statute, *supra* note 22, art. 8*bis* ¶ 1.

138. 1974 Res. Defining Aggression, *supra* note 69, art. 2.

Another, albeit more minor, distinction is that the Kampala definition explicitly applies to acts committed against "the sovereignty, territorial integrity or political independence of a State" while the 1974 refers only to acts committed against a State.[139]

The similarities and differences between the two definitions of the crime of aggression highlight an interesting twist on the attempt of the *realpolitik* to avoid defining and legally proscribing aggression. The process may have been stalled time and time again, and the Security Council may continue to avoid referring to any conduct as an act of aggression, but the definition of aggression adopted by the General Assembly in 1974 was given new life thirty-six years later when it was referenced and reiterated in the 2010 Kampala Amendments. But unfortunately, the same cannot be said for all codification efforts.

B. Comparison of Draft Codes of International Crimes within and outside the United Nations system

While ultimately, the United Nations has not yet adopted a code of international crimes, there have been a number of attempts to achieve such a goal, both within the United Nations' system and outside of it. As stated above, within the UN system there were three main draft codes: the 1954 Draft Code of Offenses Against the Peace and Security of Mankind;[140] the 1991 Draft Code of Crimes against the Peace and Security of Mankind;[141] and 1996 Draft Code of Crimes against the Peace and Security of Mankind.[142] Outside of the United Nations' system, the attempt to codify international crimes was undertaken by this writer with the support of the AIDP and came to fruition in the 1980 Draft International Criminal Code.[143] Despite the United Nations' failure to adopted any of the proposed codes, the work of these codes' drafters was not in vain.

As the *ad hoc* and piecemeal approach to the codification of international criminal law continues to this day, it is paramount that the international community recognizes all that can be accomplished through the adoption of a clear, policy-oriented legislative process, and all that is lost in the *ad hoc*, haphazard drafting process often employed within the United Nations' system. For a number of reasons including a lack of political interference, the contributions of highly experienced international jurists and the ability to work on both a draft code and draft statute, the alternative draft code produced by this writer in 1980 was able to succeed in many areas where the Draft Codes from 1954, 1991 and 1996 did not. The ways in which a clear policy and legislative technique succeeded where the piecemeal approach employed by the United Nations did not is evident in the crimes defined and proscribed by the draft codes as well as the structure of the

139. *Compare* 1974 Res. Defining Aggression, *supra* note 69, art. 2 *with* Rome Statute, *supra* note 19, art. 8*bis* ¶ 2.

140. Drafted by a committee of the International Law Commission under a United Nations General Assembly mandate. *See* 1954 Draft Code, *supra* note 17.

141. *See* BASSIOUNI, COMMENTARIES, *supra* note 44.

142. *See* 1996 Draft Code, *supra* note 102.

143. *See* 1980 Draft Code, *supra* note 86.

codes themselves and to whom they were applicable. An analysis of the draft codes within the UN system and how they evolved overtime also evidences all that can be lost when the legislative process must give way to the *realpolitik* at play.

In regards to criminal responsibility, the 1954 Draft Code limited criminal responsibility to individuals for the commission of acts deemed international offenses,[144] while the 1991 Draft Code provided for individual criminal responsibility but did not provide for state responsibility nor for the criminal responsibility of organizations or corporate entities.[145] The 1996 Draft Code provided for individual criminal responsibility, while stating that such individual criminal responsibility does not limit state responsibility.[146] As a whole, the provisions regarding criminal responsibility in all three draft codes within the UN system highlight the inability to reach a collectively agreed upon method for establishing criminal responsibility and how far such responsibility should extend. The 1980 Draft Code was able to achieve a clear notion of criminal responsibility as it provided for criminal responsibility for states as well as for any "group or organization other than a state or an organ of a state, irrespective of the responsibility of its members."[147]

As noted above, the 1954 Draft Code, 1991 Draft Code and 1996 Draft Code were all limited to crimes that feel within the purview of the codes' title, offences/ crimes that affect the peace and security of mankind.[148] The 1980 Draft Code of international crimes drafted by this writer was not limited to such a grouping of crimes and therefore was more comprehensive and detailed than its United Nations counterparts. The 1954 Draft Code is comprised of thirteen international offences against the peace and security of mankind,[149] the 1991 Draft Code includes twelve crimes[150], and the 1996 proscribes only five international crimes.[151] On the other hand, the 1980 Draft Code contains twenty articles, divided into four categories: (i) acts which are deemed international crimes under existing international

144. 1954 Draft Code, *supra* note 17, art. 1 ("Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished.").

145. *See* BASSIOUNI, COMMENTARIES, *supra* note 44, at 113.

146. *See* 1996 Draft Code, *supra* note 102, art. 2, 4.

147. Bassiouni 1980 Draft Code, *supra* note 98, at 95.

148. Highlighting this point is the fact that the first eight offenses included in the Draft Code are related to acts of aggression, territorial aggression or the use of force by one state against another state. *See* 1954 Draft Code, *supra* note 17. *See* BASSIOUNI, COMMENTARIES, *supra* note 44; and *see* 1996 Draft Code, *supra* note 102.

149. 1954 Draft Code, *supra* note 17.

150. The crimes contained in the 1991 Draft Code are as follows: art. 15-agression; art. 16- threat of aggression; art. 17-intervention; art. 18-colonial domination and other forms of alien domination; art. 19- genocide; art. 20- apartheid; art. 21- systematic or mass violations of human rights; art. 22- exceptionally serious war crimes; art. 23- recruitment, use, financing and training of mercenaries; art. 24- international terrorism; art. 25- illicit traffic in narcotic drugs; art. 26- willful and sever damage to the environment. BASSIOUNI, COMMENTARIES, *supra* note 44, at 93.

151. These five crimes are: art. 16-the crime of aggression; art. 17- crime of genocide; art. 18- crimes against humanity; art. 19- crimes against United Nations and associated personnel; art. 20- war crimes. 1996 Draft Code, *supra* note 102, at 42–53.

conventions;[152] (ii) acts which are deemed international crimes pending international conventions before the UN, whose adoption is impending;[153] (iii) acts whose prohibition in the object of certain international conventions but which are not considered international crimes;[154] (iv) acts which are the object of contemporary international concern and about which international conventions are expected.[155] This exemplifies the manner in which over time the crimes defined within the United Nations system were cut short again and again, while a lack of political bureaucracy allowed the 1980 Draft Code to contain a comprehensive listing of international crimes.

As for specific crimes, all four draft codes attempt to codify and proscribe the crime of aggression, albeit with different specificity as to the definition provided therein. The 1954 Draft Code, as stated above, does not provide a definition for the crime of aggression because such a definition did not fall under the drafting committee's mandate.[156] The 1991 Draft Code's definition of aggression almost

152. This category includes the crimes of: aggression; war crimes; unlawful use of weapons; genocide; crimes against humanity; apartheid; slavery and related crimes; torture (as a war crimes); unlawful medical experimentation (as a war crime); piracy; crimes relating to international air communications; threat and use of force against internationally protected persons; taking of civilian hostages; unlawful use of the mails; drug offenses; falsification and counterfeiting; theft of national and archeological treasures (in time of war); interference with submarine cables; international traffic in obscene material. Bassiouni 1980 Draft Code, *supra* note 98, at 25.

153. Torture (as a specialized convention). *Id.*

154. Torture (as a human rights violation); unlawful medical experimentation (as a human rights violation); theft of national and archeological treasures (in a time of peace as a culturally protected right). *Id.*

155. Unlawful medical experimentation (in time of peace); bribery of foreign public officials. *Id.*

156. Rather the task of defining the international crime of aggression was mandated to a special committee established for that very purpose. Despite the lack of a definition for aggression, the second international offenses of the 1954 Draft Code is "[a]ny threat by the authorities of a State to resort to an act of aggression against another State." 1954 Draft Code of Offenses, *supra* note 17, art. 2(2). The following seven offences all relate to the use of force, employment of aggression or interference with the sovereignty of one state by another state. They are:

> (3) The preparation by the authorities of a State of the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.
>
> (4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.
>
> (5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.
>
> (6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.
>
> (7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same

verbatim follows the definition of aggression adopted by the General Assembly in 1974[157] and the 1996 did not provide a definition for the crime.[158] The 1980 Draft Code contains not only definition for the crime of aggression, but also provides for consequences, the scope of the prohibition and method for interpretation,[159] highlighting the advantage of drafting such a code independent from the political pressure and bureaucratic inference that the UN can have on such a task, as well as the inability of those who opposed codifying the crime of aggression from asserting their delay tactics.

All four draft codes also codify the crime of genocide, although the 1954 Draft Code does not refer to the crime as genocide, rather it just provides its elements. The same is true for crimes against humanity, but both the 1954 and 1991 draft codes do not use the term "crimes against humanity,"[160] again just providing its elements. All four draft codes also criminalize the commission of wars crimes, but the 1991 draft code limits the crime to "exceptionally serious war crimes."[161]

As mentioned above the 1991 Draft Code expanded the number of crimes contained in the code to the point that it was rejected as overly broad, and thus resulted in the extremely curtailed 1996 Draft Code. Crimes contained in the 1991 Draft Code that were not included in any prior or subsequent codes, included: the colonial domination and other forms of alien domination and the willful and severe damage to the environment.[162]

The 1954, 1991 and 1996 Draft Codes were all a product of the United Nations' system and as such evidenced the difficulties of a drafting process intentionally splintered to avoid any real progress. As all three of the UN system draft codes were drafted separate and apart from the drafting of statute for an international criminal court, their codification efforts remained pigeonholed to the drafting of a code of international crimes only. The drafter of the 1980 Draft Code was not limited to a code of crimes exclusively and was free to consider, and even

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character.

(8) The annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law.

(9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind.

Id. art. 2(3)–(9).

157. *Id.* art. 2(3).

158. 1996 Draft Code, *supra* note 102, art. 16 "An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression."

159. 1980 Draft Code, *supra* note 37, at 52–54.

160. 1954 Draft Code, *supra* note 17, at 150. The eleventh crime contained in the 1954 Draft Code was "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities." 1954 Draft Code, *supra* note 17, art. 2(11).

161. BASSIOUNI, COMMENTARIES, *supra* note 44, at 16.

162. *Id.*

draft, a statute for an international criminal court that would have jurisdiction over such crimes when he was undertaking the 1980 Draft Code. Thus, the 1980 Draft Code was structured in a manner that would allow it to be enforced by an international criminal court (direct enforcement model) or through the national criminal justice systems of states (indirect enforcement model).[163] The 1980 Draft Code was drafted to be flexible in its applicable as well as designed with the option of being embodied in a single convention with a draft statute for an international criminal court or as a stand-alone convention.[164] These successes of the 1980 Draft Code evidence what can be achieved when the codification of international crimes is not intentionally separated from the drafting of a statute for a court that would have jurisdiction over such international crimes, as was the case in the United Nations system.

The limited nature of the draft codes within the United Nations' system once again highlights all that is lost when international crimes are codified (or attempts at codification are made) without any clear legislative approach. The UN approach began with the 1954 Draft Code which lacked comprehensive definition of crimes it was attempting to codify; it did not consider the existence of an international criminal court with jurisdiction over such crimes nor did it include all relevant international offenses. The successor to the 1954 Draft Code was the 1991 Draft Code, which had its own issues leading to its demise. The 1991 Draft Code was considered to be overly broad to the point of violating general principles of legality, and it contained crimes considered beyond the mandate of the General Assembly, as they were not yet recognized under international law or had not yet ripened to the level of international crimes.[165] Finally, the 1996 Draft Code was extremely barebones and failed to define or codify a number of international crimes.[166] The 1980 Draft Code therefore was the most comprehensive and inclusive draft code submitted to the United Nations and evidences the great strides

163. 1980 Draft Code, *supra* note 98, at 107–17.

164. *Id.* The 1980 Draft Code contains far more than just a list of crimes and their definitions, as it includes provisions regarding the applicability of the code. The 1954 Draft Code did not go so far and was largely limited to a list of crimes with minimal definitions. The way in which this flexibility was accomplished was through drafting the 1980 Draft Code in three parts, Part I a General Part, Part II a Special Part and Part III a Procedural Enforcement Part. The General Part is necessary for direct enforcement by an international criminal court and therefore contains provisions regarding the applicability of the draft code, jurisdiction, definitions for terms such as 'state,' 'person, individual' and 'group or organization.' The General Part also included an about the references article providing for criminal responsibility for individual and state and non-state organization as well as a more general overview on the application of penalties. This General Part presumes the existence of an international criminal court (i.e. direct enforcement) and therefore may be severed if the code is being enforced by a national judicial system under the indirect enforcement model. The Special Part is applicable no matter the enforcement model as codifies twenty-two categories of international crimes. Finally, the third part, the Procedural Enforcement Part applies to both models of enforcement and contains provisions on extradition, judicial assistance, recognition of foreign penal judgments and other procedural mechanisms.

165. BASSIOUNI, COMMENTARIES, *supra* note 44, at 97.

166. Rosemary Rayfuse, *The Draft Code of Crimes Against the Peace and Security of Mankind: Eating Disorders at the International Law Commission*, 8 CRIM. L. F. 58, 59 (1997).

that can be made when international crimes are codified - or attempts at codification are made - with a clear legislative approach.

IV. CONCLUSION

As seen in the comparison of the 1954, 1991 and 1996 Draft Codes from the United Nations system and the 1980 Draft Code undertaken by this writer, on the path to the codification of international criminal law there is much to be gained by employing a clear policy-oriented, comprehensive legislative process. The *ad hoc* approach taken within the United Nations has produced little tangible gains, and there is still no comprehensive code of international crimes. Elementary legislative policy, as applied in states' domestic codifications of criminal law on a variety of subjects as it exists in almost every country in the world, is absent in international criminal law. For example, the protected social interest is not always clearly identified,[167] continuity is frequently lacking in successive conventions on the same subject,[168] the same or similar provisions appear in multiple conventions on separate subjects even when these provisions have been found ambiguous or unclear.[169]

The issues regarding the development and codification of international criminal law pose the question, where do we go from here? In order to combat the commission of international crimes, particularly those that threaten global peace and security or offend commonly-shared human and social values, there must be progress in the codification efforts with greater attention paid to legislative and policy-oriented approaches. Despite its roots in early Roman legal codification, the development of international criminal law has strayed from the idea of detailed codification efforts by subject-matter in a continuous, congruent effort and resorted to the haphazard approach seen in the path to defining and proscribing aggression.

Unfortunately, the haphazard or *ad hoc* manner in which the codification of international crimes developed, particularly the crime of aggression, is the

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167. *See* INTRO TO ICL, *supra* note 7, at 504–06. *See generally* M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Daut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995).

168. *See* 1912 International Opium Convention, Jan. 23, 1912, 1921 U.N.T.S. 17. *See* Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175. This was followed by the 1925 International Opium Convention, the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs. Then the 1936 Convention for Suppression of the Illicit Traffic in Dangerous Drugs, the 1946 Protocol Amending the Agreements, Conventions and Protocols on Narcotic Drugs, the Paris Protocol of 1948, the 1953 Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and the Use of Opium. *See also* Bernard Leroy, M. Cherif Bassiouni & Jean-François Thony, *International Drug Control System, in* INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 855, 864–75 (M. Cherif Bassiouni, ed., 3rd ed., 2008).

169. *See* Convention for the Suppression of Unlawful Seizure of Aircraft art. 5-6, Dec. 16, 1970, 860 U.N.T.S. 105 (priority of jurisdiction and the difficulties it created in the Lockerbie case); *see* Michael P. Scharf, *The Lockerbie Model of Transfer of Proceeding, in* INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 2008); Omer Y. Elagab, *The Hague as the Seat of the Lockerbie Trial: Some Constraints*, 34 INT'L L. 289, 289 (2000); Michael P. Scharf, *Terrorism on Trial: The Lockerbie Criminal Proceedings*, 6 ILSA J. INT'L & COMP. L. 355, 356–57 (1999-2000).

paradigm of international criminal law development and not the outlier. The international criminal law system, as explained above, relies on states to push forward its development and with state actors comes states' desires of wealth and power. This world of *realpolitik* has limited the codification and proscription of international crimes acting only when necessary as a result. This pattern can be seen in the new international focus on the illicit trade or trafficking and the many crimes that fall under its broad umbrella.

Illicit trade or trafficking encompasses a number of different international crimes and from a codification or proscription view it is most closely associated with organized crime. Unlike the Roman tradition of codification by subject-matter with clear legislative policy goals at the forefront of criminal codification, the international regime of illicit trafficking developed like the rest of international criminal law. What is referred to as unlawful or illicit trafficking, places in the same category such diverse activities as: trafficking in human-beings (including the most abhorrent of these practices involving trafficking in human-beings for sexual bondage), trafficking in human organs, trafficking in counterfeit materials whether they be medicinal cigarettes, scarves or neckties. Illicit trafficking also covers the trade of cultural property as well as trafficking in obscene materials.

As if foreshadowing the lengthy, piecemeal process that would surround the codification of illicit trafficking, the international focus on illicit trade/ or trafficking began as an attempt to suppress the existence and growth of criminal organizations. Between 1975 and 2000, the international community worked to identify and proscribe conduct of organized criminal enterprises, which included crimes regarding illicit trade and trafficking.[170] This process culminated in 2000

170. In 1975, the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders focused on 'Changes in Forms and Dimensions of Criminality-Transnational and National' which centered on crime as a business and encompassed organized crime, white-collar crime and corruption. Dimitri Vlassis, *Challenges in the Development of International Criminal Law: The Negotiations of the United Nations Convention Against Transnational Organized Crime and the United Nations Convention Against Corruption, in* INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 907, 908 (M. Cherif Bassiouni, ed., 3rd ed., 2008) [hereinafter Challenges in the Development of ICL]. Five years later at the Sixth United Nations Congress the focus became crimes committed in such a manner that they would be unlikely to be reported to law enforcement agencies or prosecuted, which included organized crimes, bribery and corruption. *Id.* The Seventh Congress, held in 1985, emphasized crimes committed by international criminal networks and the Eighth Congress further examined criminal networks and the need for international institutions focused on prevention efforts, in 1990. The Eighth Congress recommended that the General Assembly adopt an international instrument as well as a set of guidelines for combating organized crimes. Treaties were: the Model Treaties on Extradition, G.A. Res. 45/116. These continuing efforts lead to the General Assembly's 1991 decision to overhaul its United Nations Crime Prevention and Criminal Justice Programme by disbanding the Committee on Crime Prevention and Control which oversaw the Programme and instead establishing a Commission on Crime Prevention and Criminal Justice. Vlassis, *supra* note 170, at 909.

The Commission held its first session in 1992 and its focus was on increasing state corporation in the efforts combat organized crime and the commission of international crimes. The efforts to codify legislation on organized crime resulted in the Naples Political Declaration and Global Action Plan against Organized Transnational Crime, which emphasized the need for states to cooperate in their efforts against organized crime and was adopted by the General Assembly in 1994. Yet it was not until 1998 that these efforts resulted in the establishment of an *Ad Hoc* Committee on the drafting of an

with the General Assembly's adoption of the Convention Against Transnational Organized Crime and its three protocols: Protocol Against the Trafficking in Persons, Especially Women and Children; Protocol against Smuggling of Migrants by Land, Sea and Air; and Protocol against Illicit Manufacturing of and Trafficking Firearms, Their Parts and Components and Ammunition.[171]

While the adoption of the Convention and its Protocols appeared to be a step forward for combatting illicit trade, in the world of *realpolitik* the codification efforts were once again haphazard. The breadth of the crime of illicit trade or trafficking is so broad that illicit trade encompasses everything from human trafficking to trading in Hermés ties or cigarettes. While human trafficking is often considered to fall under the category of international law regarding slavery and slave-related practices, the codification efforts now also place human trafficking alongside trafficking in stolen or counterfeit goods and crimes that fall under the umbrella of organized crime offenses. This categorization from a human and social values perspective is shocking, but like the majority of the development of the codification of ICL, it results from a lack of policy and guidelines for legislative processes.

The attempt to combat illicit trade or trafficking through codification efforts was also undertaken outside of the organized crime regime. The illicit trade of cultural property,[172] has been codified in five different international instruments from 1954 to 2000, including the Convention Against Transnational Organized Crime.[173] The attempt to combat trafficking in illicit drugs also falls under this regime and was proscribed in a number of different conventions described in section one. Trafficking in obscene materials is proscribed in eight international instruments from 1910 to 1949 and additionally, thirty-two other instruments are

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international convention against organized crime.

171. United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, at 1 (Nov. 15, 2000) (entered into force Sept. 29, 2003); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, at 41(Nov. 15, 2000) (entered into force Dec. 25, 2003); Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, at 53 (Nov. 15, 2000)(entered into force Jan. 28, 2004); Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/255, at 69 (May 31, 2001) (entered into force July 3, 2005).

172. Cultural property is property which reflects the cultural heritage of people who claim it as their own. James A.R. Nafziger, *Protection of Cultural Property*, in INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 977 (M. Cherif Bassiouni ed., 3rd ed. 2008).

173. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240; First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358; Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172; UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Cultural Convention]; Convention Against Transnational Organized Crime, *supra* note 171.

applicable to the crime.[174] Trafficking in obscene materials poses a unique issue despite the numerous instruments on the topic in that such instruments do not define a substantive crime. The instruments do not criminalize the production of obscene materials, only their international traffic and therefore effective enforcement is greatly limited when the object of the offense is not punishable, only its transportation.[175]

Illicit trafficking also encompasses trafficking in counterfeit goods and fraudulent medicines, including a wide array of goods such as automotive parts, chemicals and pesticides, electrical components, pharmaceuticals and tobacco.[176] The traffic and sale of these goods are proscribed under the Convention Against Transnational Organized Crime.

Like other developments in the codification of international criminal law, in addition to the lack of science or technique involved, the codification efforts apply almost exclusively to non-state actors.

The trafficking/trade of all the previously mentioned objects and persons fall under the purview of illicit trade but have been proscribed in a number of instruments and with the exception of the Convention Against Transnational Organized Crime, there is very little cohesion in the instruments both within each subject-matter area as well as within the regime of illicit trade or trafficking as a whole. It is certainly shocking from a value-perspective to see human trafficking for sexual exploitation put in the same general category as trafficking in unlawfully branded cigarettes, and to see little differentiation in these crimes that are placed in the same category, notwithstanding the diversity of the human and social interests they address, and the human harm they produce.

While the absence of international legislative policy is particularly evident in the failure to rank crimes on the basis of the human and social values sought to be protected, it is also quite troublesome to see convention after convention use the same phraseology and terms applicable to the two most common means of enforcement namely, extradition and mutual legal assistance with as little specificity as they usually contain.[177] One cannot help by being suspicious of the intentions of the drafters who continuously use *de minimus* descriptions of the most important enforcement means, which has led most states not to rely on these enforcement mechanisms.

Like aggression, the codification process for illicit trade or trafficking highlights the lack of a clear policy-oriented legislative process applicable to the development and codification of international crimes. This *ad hoc* approach has continually allowed *realpoliticians* to place their own goals of wealth and power

174. INTRO TO ICL, *supra* note 7, at 214.

175. *Id.* at 215.

176. United Nations Office on Drugs and Crime, *Focus On: The Illicit Trafficking of Counterfeit Goods and Transnational Organized Crime*, https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf (last accessed Oct. 24, 2016).

177. *See* INTRO TO ICL, *supra* note 7, at 504–05; *see generally* Bassiouni & Wise, *supra* note 167.

ahead of the needs of the international community and world's peoples. Whether this *ad hoc* approach is the intentional work of *realpoliticians* or the unavoidable consequence of the difficult process of criminalizing conduct at an international level, the codification of international criminal law has long strayed from its roots in clearly-defined, subject-matter based Roman legal development. The result has once again favored the interests of states over their populations and allowed *realpolitik* to thrive in the face of any real developments in the codification process. Thus, the question remains as to what path international jurists will continue to follow, the haphazard approach of the past or a science and legislative path of the future.

BRINGING BITS BACK FROM THE BRINK

INCORPORATING PROGRESSIVE TREATMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS TO MAINTAIN POLICY SPACE FOR STATE REGULATION OF HUMAN RIGHTS

*Jeremy S Goldstein

I. INTRODUCTION

In 2011, the United Nations (UN), and as proposed by John Ruggie, Special Representative of the Secretary General, published the Guiding Principles on Business and Human Rights (UNGP's), with the objective of "enhancing standards and practices with regard to business and human rights."[1] The UNGP's offer "guidance and recommendations to states and companies"[2] in implementing the Special Representative of the Secretary General's (SRSG) 2008 Report, the UN 'Protect, Respect, and Remedy' Framework for Business and Human Rights.[3] UNGP Article 9 recommends that states "maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other states or business enterprises, for instance through *investment treaties*[.]"[4] Article 9 recognizes the impact that investment treaties, primarily international investment agreements (IIAs) and bilateral investment treaties (BITs), have on human rights in the modern global economy.[5] It also posits that IIAs need not be inherently detrimental to the furtherance of human rights protections when drafting is guided by policy aimed at maintaining adequate domestic policy space.[6]

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1. U.N. Office of the High Commissioner of Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "*Protect, Respect and Remedy*" Framework, U.N. Doc. HR/PUB/11/04, at 1 (2011) [hereinafter UNGP].

2. Andrea Shemberg (legal advisor to the U.N. Special Representative to the Secretary General for Business & Human Rights), *Stabilization Clauses and Human Rights A Research Project Conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights* 1 (May 27, 2009).

3. John Ruggie (Special Representative of the Secretary General), *Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

4. UNGP, *supra* note 1, art. 9, at 11 (emphasis added).

5. UNGP, *supra* note 1, art. 9, at 11.

6. UNGP, *supra* note 1, art. 9, at 11.

IIAs are agreements between and among states, which "are designed to protect foreign investment[s] from one country from interference by the government of the country in which the investment is located."[7] IIAs are typically embodied as either a BIT between two states or a multilateral investment agreement among more than two states, and are designed to increase foreign direct investment (FDI) inflows.[8] Each BIT is a unique instrument, but all investment agreements contain fundamental provisions protecting distinct categories of investor interests.[9] These categories include the treatment of investment, nationalization/expropriation, general exceptions, and dispute resolution.[10] When

7. JONATHAN BONNITCHA, IISD REPORT: MYANMAR'S INVESTMENT TREATIES: A REVIEW OF LEGAL ISSUES IN LIGHT OF RECENT TRENDS 1 (Int'l Inst. for Sustainable Dev. ed., 2014).

8. Rational theorists disagree on whether IIAs actually increase FDI. This author believes that IIAs are crucial to attracting investment in order to compete with other nations which also engage in IIAs. This is discussed in section II herein. *See generally* MARC JACOB, INTERNATIONAL INVESTMENT AGREEMENTS AND HUMAN RIGHTS, (Inst. for Dev. & Peace ed., 2010); Mary Hallward-Dreimeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a bit...and They Could Bite* (World Bank Dev. Research Grp., Policy Research Working Paper No. 3121, 2003), https://openknowledge.worldbank.org/handle/10986/18118.

9. The language used to express treatment differs amongst agreements. Often these categories of interests are not defined in separate provisions and can be confusing, specifically in older treaties. *See generally, e.g.*, Agreement between the Government of the Peoples Republic of China and the Government of Jamaica Concerning the Encouragement and Reciprocal Protection of Investments, China-Jam., Oct. 26, 1994, http://investmentpolicyhub.unctad.org/IIA/country/104/treaty/917; Treaty between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Hond., July 1, 1995, T.I.A.S. No. 106-27; Agreement between The Republic of Turkey and The Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, Turk.-Spain, Feb. 15, 1995, http://investmentpolicyhub.unctad.org/IIA/country/214/treaty/2953. Alternately, some BITs separate each distinct interest and actor, and include category headings. *See generally, e.g.*, Agreement between the Republic of Turkey and the Transitional Islamic State of Afghanistan Concerning the Reciprocal Promotion and Protection of Investments, Turk.-Afg., July 10, 2004, http://investmentpolicyhub.unctad.org/IIA/country/214/treaty/3; Agreement between the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, Eth.-Fr., June 25, 2003, http://investmentpolicyhub.unctad.org/IIA/country/72/treaty/1475; Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., Nov. 4, 2005, TIAS No. 06-1101.

10. The language used to express treatment differs amongst agreements. Often these categories of interests are not defined in separate provisions and can be confusing, specifically in older treaties. *See generally, e.g.*, Agreement between the Government of the Peoples Republic of China and the Government of Jamaica Concerning the Encouragement and Reciprocal Protection of Investments, China-Jam., Oct. 26, 1994, http://investmentpolicyhub.unctad.org/IIA/country/104/treaty/917; Treaty between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Hond., July 1, 1995, T.I.A.S. No. 106-27; Agreement between The Republic of Turkey and The Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, Turk.-Spain, Feb. 15, 1995, http://investmentpolicyhub.unctad.org/IIA/country/214/treaty/2953. Alternately, some BITs separate each distinct interest and actor, and include category headings. *See generally, e.g.*, Agreement between the Republic of Turkey and the Transitional Islamic State of Afghanistan Concerning the Reciprocal Promotion and Protection of Investments, Turk.-Afg., July 10, 2004,

an unexpected harm occurs to an investment as a result of an action by a host state, dispute settlement clauses allow a foreign investor, operating under the protection of a BIT, to file an 'investor-state arbitration' against the host state.[11]

Most pertinent to the cause of their conflict with state-imposed human rights protections, BITs create only rights for investors without obligations, and only obligations for host states seemingly unaccompanied by any substantive rights.[12] Of principle concern are traditional treatment provisions.[13] These provisions create substantial rights for investors to file claims restricting host states[14] domestic policy space to legislate to meet its international human rights obligations.

This article analyzes methodology for drafting treatment provisions which reserve states domestic policy space to regulate human rights in-line with UNGP Article 9. This article examines: state practice in the form of existing treaties, model IIAs, draft IIAs, and policy statements; recommendations from civil society, international organizations, and intergovernmental organizations, including various Model IIA's and Model BIT's; and the work of popular academics and jurists.

Following this introduction, Section II provides background and context on the issue. Section III briefly presents the history and purpose of IIAs, and considers their efficacy. Section IV introduces the core principles of traditional BITs and explains how treatment provisions enshrined therein restrict government policy space regarding human rights regulation. Section V discusses conflicts between IIAs and international law. Section VI examines UNGP Article 9 and analyzes its recommendations in the context of the greater IIA regime. Section VII presents and analyzes the methodology available for drafting treatment provisions in IIAs in a manner which heeds the recommendations of UNGP Article 9, by examining existing and model IIAs and BITs. Section VIII concludes and provides the author's opinion.

II. BACKGROUND

John Ruggie, UN Secretary-General Special Representative for Business and Human Rights, included Article 9 in the UNGP's out of concern for the unequal distribution of rights and obligations IIAs create, particularly in private investment

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http://investmentpolicyhub.unctad.org/IIA/country/214/treaty/3; Agreement between the Government of the Federal Republic of Ethiopia and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments, Eth.-Fr., June 25, 2003, http://investmentpolicyhub.unctad.org/IIA/country/72/treaty/1475; Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., Nov. 4, 2005, TIAS No. 06-1101.

11. *See* BONNITCHA, *supra* note 7; Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L. J. 435, 436 (2009) ("There are sharp disagreements related to the legitimacy of investment treaty arbitration. The president of Bolivia asserts that developing countries in Latin America" never win any cases.).

12. BITs were not originally intended to create any obligations on investors. Investors are subject to the laws of the states in which they do business. *See, e.g.*, Stiglitz, *infra* note 24, at 5–11.

13. *See infra* Sections II & III.

14. *See infra* Section IV.

contracts[15] and traditional BITs.[16] The concern is that this unequal distribution impacts states' domestic policy space relating to human rights and the environment.[17] When a state regulates in a manner which seeks to protect or promote a human rights interest,[18] foreign investors operating under a BIT are more likely to successfully challenge the measure than those operating without investment protections.[19] Damage awards in investor-state arbitrations can reach into the billions of U.S. dollars.[20] In *Occidental v. Ecuador*, the International Center for Settlement of Investment Disputes (ICSID)[21] decided that Ecuador had been in breach of a BIT provision for conduct which was "tantamount to expropriation."[22] While the fairness of the ultimate decision on the issues is not under intense scrutiny, the tribunal awarded Occidental US $1.7 billion, even though Ecuador justified their actions with proof that the company had intentionally committed other serious regulatory violations.[23] As a result, states have become fearful of advancing domestic policies, particularly those relating to human rights and the environment, which may encourage claims.[24]

This 'regulatory chill' can affect a plethora of policy decisions not protected

15. Private investment contracts frequently include stabilization clauses which can explicitly limit state's domestic policy space to a specific or unlimited degree. Ruggie, *supra* note 3, at 3, ¶ 2-4.

16. Traditional BITs are loosely defined as those developed prior to the advent of modern IIA model agreements and/or those which include unqualified terms of art, lack of domestic policy space, and few additional exceptions provisions. These are to be described more in detail herein in Section II. *See, e.g.*, Agreement between the Government of the People's Republic of China and the Government of the Union of Myanmar on the Promotion and Protection of Investments, China-Myan., Dec. 12, 2001, http://investmentpolicyhub.unctad.org/Download/TreatyFile/762.

17. George K. Foster, *Investors, States and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties, Business Law Forum – Balancing Investor Protections, the Environment, and Human Rights*, 17 LEWIS & CLARK L. REV. 361, 368 (2013).

18. Examples include a state seeking to use police powers to protect citizens from having their rights violated by a foreign investor, a policy measure designed to encourage basic rights codified in an International treaty, and an interpretive decision on an environmental and human safety regulation intended to remedy a legal-loophole under which an investor operates. PETERSON & GRAY, *infra* note 29, at 5.

19. *Id.*

20. *E.g.*, Franck, *supra* note 11, at 435 ("a typical claim might involve an investor demanding over US$300 million from a host state").

21. ICSID is the largest, and most commonly utilized, International investment arbitration panel. For more on the Occidental v. Ecuador ruling *see*, Tai-Heng Cheng & Lucas Bento, *ICSID's Largest Award in History: An Overview of Occidental Petroleum Corporation v the Republic of Ecuador*, KLUWER ARBITRATION BLOG (Dec. 19, 2012), http://kluwerarbitrationblog.com/blog/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador.

22. Occidental Petrol. Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 416 (Oct. 5, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C80/DC2672_En.pdf.

23. *Id.* ¶ 876.

24. Joseph E. Stiglitz, *Multinational Corporations: Balancing Rights and Responsibilities*, 101 AM. SOC'Y INT'L L. PROC. 3, 10 (2007).

under the traditional BIT regime.[25] This includes domestic measures that are advanced to achieve legitimate non-investment related policy objectives, such the strengthening of labor laws, and the introduction human rights or environmental protections.[26] States with traditional BIT regimes are most susceptible to policy space restrictions. The chilling effect weighs heaviest on developing nations because they have the greatest need to continue advancing their regulatory regimes as compared to states with developed regulatory environments.[27] Developing states also more frequently engage in traditional BITs relative to developed nations, making them significantly more susceptible to investor claims.[28]

The regulatory chill largely escaped concern until recently because foreign investors only first began to invoke dispute settlement mechanisms in BITs in the mid-1980's.[29] With the long term consequences of engaging in IIA's now readily apparent, some states are rapidly moving to denounce their traditional BITs;[30] both Venezuela and Ecuador have terminated agreements.[31] Other nations have selected to renegotiate agreements; South Africa and Indonesia have begun this process.[32] However, only so much renegotiation is possible. Basic investor protections that establish discipline on host state measures, generally obliging them to provide compensation for expropriation, and to treat foreign investors fairly, equitably, and in a non-discriminatory manner, are intrinsically necessary in any IIA.[33] For capitol-importing nations, FDI is crucial to development and the advancement of social and economic rights.[34] Investor-protective provisions in agreements which

25. Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13(4) J. OF INT'L ECON. L. 1037, 1039 (2010).

26. *Id.*

27. Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17 LEWIS & CLARK L. REV. 521, 532–33 (2013); United Nations Conference of Trade & Development, *Fair and Equitable Treatment: A Sequel, UNCTAD series on Issues in International Investment Agreements II* (2012), 2 UNCTAD/DIAE/IA/2011/5, http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf ("this approach poses special challenges for developing countries where the State may be required to intervene in the economy and introduce legislative or regulatory changes more frequently or of a greater magnitude.").

28. Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17 LEWIS & CLARK L. REV. 521, 532–33 (2013); United Nations Conference of Trade & Development, *Fair and Equitable Treatment: A Sequel, UNCTAD series on Issues in International Investment Agreements II* (2012), 2 UNCTAD/DIAE/IA/2011/5, http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf.

29. LUKE ERIC PETERSON & KEVIN R. GRAY, INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 5 (Int'l Inst. for Sustainable Dev. ed., 2003).

30. Spears, *supra* note 25, at 1043.

31. BONNITCHA, *supra* note 7, at 7.

32. BONNITCHA, *supra* note 7, at 7.

33. Spears, *supra* note 25, at 1037.

34. These rights considered are defined by the International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR]. Sustainable development requires both FDI and human rights protections, but when done properly can advance ICESCR rights. FDI is therefore crucial to developing nations' ability to advance economic rights. *See* Megan Wells Sheffer,

provide the basis for investor-state claims cannot be entirely eliminated.

Most states concerned about the consequences of engaging in IIAs are not abandoning their agreements in whole. Many recognize that IIA's need not be inherently detrimental to human rights when drafted in a manner which does not restrict domestic policy space. These states are now developing model agreements to guide future IIA drafting in line with UNGP recommendations. Guided by the UNGP, states, specifically developing nations, should be able to take full advantage of the positive benefits that IIAs have on advancing development without succumbing to a restriction on their ability to regulate human rights abuses. This is especially true when those abuses are prohibited by conventions comprising the International Bill of Human Rights,[35] and those enshrined in ILO conventions enumerating protections for children, minorities, and laborers.[36]

III. WHAT ARE IIAS?

a. The History of IIAs

Over the past quarter-century, the number of BITs that comprise the patchwork of the international investment policy regime has skyrocketed;[37] UNCTAD reports less than 500 agreements before 1980, 1,322 in 1995, 2,495 in 2005, and over 3,000 today.[38] More than 450 investor-state arbitrations claiming provisions in BITs have been filed,[39] but formal investment treaties had their start with humble beginnings. The first formal BITs were intended to guarantee foreign investors protections easily justified as necessary to establish business; such as the right to freedom from unjustified appropriation by the state,[40] the right to pay only the market tax rate,[41] and the right to operate free of discrimination on the basis of

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Bilateral Investment Treaties: A Friend or Foe to Human Rights?, 39 DENV. J. INT'L L. & POL'Y 483, 483 (2011).

35. International Covenant on Civil and Political Rights (ICCPR), Mar. 23, 1976, 999 U.N.T.S. 171 (1966); International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

36. Freedom of Association and Right to Organise Convention; Right to Organise and Collective Bargaining Convention; Forced Labour Convention; Abolition of Forced Labour Convention; Minimum Age Convention; Worst Forms of Child Labour Convention; Equal Remuneration Convention; Discrimination (Employment and Occupation) Convention.

37. PETERSON & GRAY, *supra* note 29, at 7.

38. United Nations Conference on Trade & Development, International Investment Agreements Navigator (2013), http://investmentpolicyhub.unctad.org/IIA; Stiglitz, *supra* note 24.

39. Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423, 426 (2013).

40. The guarantee of protection from undue appropriation or nationalization without compensation exists in all BITs and recommended by all models, albeit with slightly varying language. *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, https://www.state.gov/documents/organization/188371.pdf (2012) [hereinafter U.S. Model].

41. National Treatment is guaranteed by all BITs and recommended by all Models. *See, e.g.*, Norway Draft Agreement for the Promotion and Protection of Investment,

nationality. Some scholars argue that BITs are a form of human rights protection in that they typically guarantee freedom from discrimination due to nationality.[42] Other scholars highlight the use of treatment provisions during colonial times as evidence of their sinister roots in catalyzing the exploitation of Africa, the Americas, and Asia.[43]

b. Do IIAs Increase FDI?

What impact, if any, do IIAs have on FDI? In the commentary to the UNGP, the SRSG expressly acknowledges that "[e]conomic agreements concluded by states...such as [BITs]...create economic opportunities for States[,]"[44] but does this opportunity correlate directly to increasing FDI? Numerous quantitative studies have measured changes in FDI inflows relative to IIA proliferation, and the findings are mixed.[45] The prevailing view amongst them is that the relationship between IIAs and FDI is either unclear,[46] or a stalemate.[47] Other studies have found a positive relationship between IIAs and FDI, but only when the study takes into account other specific factors.[48] Some argue that, even in a vacuum, a nation who executes more IIAs will see a resulting gross increase in FDI.[49]

As is often true, questioning whether IIAs directly stimulate FDI 'when all other things are equal' is irrelevant, because all things are not equal in this case; the global economy and political system does not exist in vacuum. Capital-importing countries, frequently developing nations with weak to moderate domestic human rights protections, can be effectively trapped in a 'prisoner's dilemma'.[50] Conceptually, it would be better for all developing nations with 'evolving' human rights and labor standards to collectively refrain from engaging

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http://investmentpolicyhub.unctad.org/Download/TreatyFile/2873 (2007) [hereinafter Norway Model].

42. *See* Nicholas Klein, *Human Rights and International Investment Protection: Investment protection as Human Right?*, 4(1) GOETTINGEN J. OF INT'L L. 199, 204–09 (2012).

43. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 1-2, (2d ed. 2012).

44. UNGP, *supra* note 1, art. 9.

45. BECKY CARTER, HELPDESK RESEARCH REPORT: THE INFLUENCE OF INTERNATIONAL COMMERCIAL AND INVESTMENT LAW AND PROCEDURE ON FOREIGN INVESTMENT AND ECONOMIC DEVELOPMENT/GROWTH 2 (Governance & Social Development Resource Centre 2013).

46. Jonathan Bonnitcha, *Outline of a Normative Framework for Evaluating Interpretations of Investment Treaty Provisions*, EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION (Chester Brown & Kate Miles eds., 2011).

47. NATHALIE BERNASCONI-OSTERWALDER ET. AL., INVESTMENT TREATIES AND WHY THEY MATTER TO SUSTAINABLE DEVELOPMENT: QUESTIONS & ANSWERS (2012).

48. *See* CARTER, *supra* note 45, § 2.1.

49. *See* Hallward-Dreimeier, *supra* note 8.

50. 'Prisoners dilemma' describes a decision-making scenario wherein a group of actors would be collectively better off if they *ALL* choose 'box a'. However, if any one actor chooses 'box b' that actor will have an advantage over all other actors. The scenario adds a caveat that while collectively all actors are better with 'box a,' IF all actors choose 'box b,' then all actors lose their competitive advantage gained through collective selection of 'box a,' AND it nullifies the individual advantage gained by the singular actor in breaking rank and choosing 'box b'.

in IIAs to avoid the 'chill'. However, if one state breaks this collective agreement it would gain a competitive advantage compared to the rest. Similarly, any nation lacking near equal investor protections relative to its regional counterparts would be perceived by investors as relatively more risky to invest in, and hence could receive less investment.[51] The prisoners' dilemma reality of IIAs extends to other parts of the decision making process as well, and is a concern in regards to the 'downward regulatory spiral.'[52] It is admitted that the relevance of IIAs to this analysis does not rest wholly on their efficacy; IIAs exist and will continued to be proliferated.

IV. FUNDAMENTAL PROVISIONS IN TRADITIONAL BITS

The core principles of any BIT are codified in provisions offering protections to investors relating to the treatment of their investment in the host state. These provisions are the most frequently cited by investors in arbitration claims,[53] and are the most controversial.[54] Most agree that the unqualified terms of art[55] in these provisions, such as favorable treatment and fair and equitable treatment (FET), lead to inconsistent interpretations by tribunals and contribute to the restrictions on policy space that states with traditional BITs face. Other scholars disagree that regulatory space in treatment provisions has any impact on how investors select a location.[56]

a. National Treatment and Most Favored Nation

National treatment provisions guarantee investors treatment equal-to, or better than, local investors, and include both pre-investment and post-investment protections. MFN provisions guarantee investors' treatment equal to any non-party third-state investors. These two provisions can be included in an IIA separately, or together as shown here: "[e]ach Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favorable than that accorded either to investments of its *own investors* or *investors*

51. *See* JACOB, *supra* note 8.

52. 'Downward regulatory spiral' describes the condition of states dismantling domestic reforms in order to attract FDI and is discussed in Section III herein.

53. BONNITCHA, *supra* note 7, at 1.

54. *See* South African Development Council Model Bilateral Investment Treaty, art. 4 (2012), http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf (recommending the non-inclusion of an MFN provision and the adoption of a different standard to FET for minimum treatment) [hereinafter SADC MODEL BIT or SADC MODEL].

55. 'Terms of art' are ambiguous phrases which do not clearly infer intent of the drafters to arbitral panels, including 'Fair and Equitable Treatment' and 'Full Protection and Security.' Thomas Innes, Stepoe & Johnson LLP, The Adoption of Terms of Art in Bilateral Investment Treaties, Panel Address at Sutton Colloquium at the University of Denver Sturm College of Law (Nov. 15, 2014).

56. Tomer Broude, Yorman Z. Haftel & Alexander Thompson, *Who Cares About Regulatory Space In BITs? A Comparative International Approach*, HEBREW UNIV. OF JERUSALEM LEGAL STUD. RES. PAPER SERIES, No. 16-41, at 8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773686.

of any third state."[57]

b. Minimum Standard of Treatment: FET and FPS

Minimum standard of treatment provisions, sometimes referred to 'absolute standard of treatment', typically include an FET requirement and a 'full protection and security' (FPS) requirement. The FET standard is designed to be an absolute standard of treatment, unrelated to how other investments are treated by the host state.[58] Minimum standard of treatment provisions are the most controversial provisions in traditional IIAs because they are commonly cited by investors in arbitrations, and have proven to be a successful basis for claims.[59] FET and FPS provisions permit arbitral tribunals to "look not just at the change in value[,] but also at the surrounding circumstances"[60] of a potential violation of an investors' rights.

The origin of FET comes from a 1926 international arbitration, *Neer v. the United Mexican States*,[61] a commonly cited decision in modern arbitrations. The *Neer* tribunal stated that:

> [I]n order to constitute an international delinquency, [treatment of a foreign investment] should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[62]

In an IIA context, the first uses of FET and FPS were in early international economic agreements such as the Havana Charter for an International Trade Organization, the US Friendship, Commerce and Navigation treaties, and the OECD Draft Convention on the Protection of Foreign Property, all developed between 1948 and 1967.[63] These agreements merely stipulate that parties shall "ensure fair and equitable treatment to the property of nationals of the other parties," and that "[s]uch property shall be accorded the most constant protection and security."[64] FET and FPS provisions which proliferated in IIAs over the past 50 years are simply not as robust as the *Neer* standard. They often mirror the OECD Draft Convention, merely restating unqualified FET and FPS terms without

57. A common example of a National Treatment provision. This example from Agreement between the Government of the Republic of India and the Government of the Republic of Bulgaria for the Promotion and Protection of Investments art. 4:2, India-Bulg., Oct. 29, 1998, http://investmentpolicyhub.unctad.org/IIA/country/96/treaty/678 (emphasis added).

58. United Nations Conference on Trade and Development, *supra* note 27, at 6.

59. Eric De Brabandere, *Human Rights Considerations in International Investment Arbitration*, THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS: LEGAL AND PRACTICAL IMPLICATIONS 17 (Malgosia Fitzmaurice & Panos Merkouris eds., 2012).

60. Stiglitz, *supra* note 24, at 39.

61. L. F. H. Neer v. United Mexican States, IV R.I.A.A. 60, Opinion of Commissioners, ¶ 6 (Oct. 15, 1926).

62. *Id.* ¶ 4.

63. United Nations Conference on Trade and Development, *supra* note 27, at 5.

64. *Id.*

reference or definition. Today, there is no generally accepted definition of FET.

The China-Myanmar BIT provides the simplest example of a traditional unqualified FET provision: "Investments of investors of each Contracting Party shall all the time be accorded *fair and equitable* treatment in the territory of the other Contracting Party."[65]

Relying on traditional BIT provisions, modern arbitral tribunals have held FET to be a widely-accepted principle "encompassing such fundamental standards as good faith, due process, non-discrimination, and proportionality."[66] Tribunals have held that regulatory measures which go beyond an investor's 'legitimate expectations' to one of the fundamental standards listed above can violate the FET requirement. Investors have claimed a range of harms under the legitimate expectations standard, including that a state failed to provide a stable legal or regulatory system,[67] that treatment was unfair and arbitrary due to unintended bureaucratic inefficiencies which caused financial harm to an investment,[68] or that a state had not acted in 'good faith' when making a regulatory policy decision.[69]

Judgments which penalize a state in reliance on this form of 'good faith' requirement can have the effect of repudiating states who attempt to enhance environmental or human rights regulations, or those which make adjudicatory decisions for the well-being of its citizens.[70] FET provisions traditionally require that states bear the burden of proof in demonstrating good faith.[71] Most tribunals only rule in favor of a state when the "record shows that the [state] treated the Claimant and its investment in good faith, and on equal footing."[72]

Some tribunals, however, have interpreted the standard to be even more investor friendly; in *Tecmed*, a tribunal awarded the investor just over US $5 million because the Mexican government refused to renew an operating license for their landfill, which was polluting drinking water in a local community.[73] The tribunal held that "a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[74] This expansion of the good faith standard places significant burden on states to not only *refrain* from acting in 'bad

65. Agreement between the Government of the People's Republic of China and the Government of the Union of Myanmar on the Promotion and Protection of Investments, China-Myan., art. 3, Dec. 12, 2012, http://investmentpolicyhub.unctad.org/Download/TreatyFile/762 (emphasis added).

66. MTD Equity Sdn. Bdh. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 109 (May 25, 2004).

67. Frontier Petrol. Services Ltd. v. The Czech Republic, UNCITRAL, Final Award, ¶ 261 (Nov. 12, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0342.pdf.

68. MTD Equity, *supra* note 66, ¶ 189.

69. Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 153 (May 29, 2003).

70. *See* United Nations Conference on Trade and Development, *supra* note 27.

71. *See id.*

72. Chemtura Corporation v. Government of Canada, UNCITRAL, Award, ¶ 236 (Aug. 2, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf.

73. Tecnias Medioambientales Tecmed S.A., *supra* note 69.

74. *Id.* ¶ 153.

faith', but to *actively* engage in 'good faith' actions. This is one way unqualified BIT provisions can lead to interpretations with the potential to restrict a state's policy space.

Additionally, in *Tecmed*, the investor had expected the government was aware of the long-term investment required to operate a landfill, and had assumed that the investment and initial approval would lead to a guaranteed re-approval of the operating license at each scheduled renewal period.[75] The government's revocation of the operating license after they discovered the pollution was cited as evidence of action contrary to the investors "legitimate expectations[.]"[76] It is possible this decision has had a restricting effect on the Mexican government's inclination to make changes to regulations which affect other similar industrial operations, even if they are found to be polluting communities, placing citizens in danger. This is an example of indirect regulatory chill.

When determining whether a regulation constitutes unfair or inequitable treatment, tribunals also consider the 'proportionality' of the harm suffered as compared to the benefit advanced by the regulatory measure. The tribunal in *Occidental* applied a case-by-case test "balancing the interests of the state against those of the [investor], to assess whether the particular sanction is a proportionate response in the particular circumstances."[77] The complication with this is that multinational enterprises (MNE's) backing foreign investment are often well equipped to file claims against states regardless of whether the expectation is of 'lower level punishments' that the court suggested may pass scrutiny as proportionate when there is no direct causal link between the act that the law seeks to punish and the harm that the law seeks to prevent.[78]

c. Stabilization Clauses

Other than these core provisions, there are other types of treatment provisions which distinctly affect government policy space, the most vilified being stabilization clauses. Typically inserted in private direct contracts between investors and states, and rarely included in state-state IIAs, these provisions guarantee that investment will be exempt from almost all new governmental regulations regardless of the reason for the measure, or that they will be compensated for any loss of income resulting from such a change.[79] These provisions are some of the most damaging to policy space as they explicitly, and

75. *See id.*

76. *Id.* ¶ 88.

77. Occidental Petrol. Corp., *supra* note 22, ¶ 417.

78. While corporations are undeterred by low-level penalties, they are often conscious of their image and may choose to employ CSR strategies themselves. Unfortunately, often enough, only the worst corporate violators are exposed. Stronger penalties are required to deter the worse violators who have less of a concern for corporate image, including those in the extractives, manufacturing, and construction industries.

79. *See* Titus Edjua & Antony Crockett, *Human Rights Not Negotiable: Stabilization Clauses and Human Rights*, 28 INT'L FIN. L. REV. 50 (2009).

by design, prohibit regulation. While demonstrably harmful, stabilization clauses are appropriately outside of the scope of this analysis because, first, they have faded from common use, and second, are not commonly included in state-state BITs.

V. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND IIAS: WHICH LAW APPLIES?

What happens when there is a conflict of law between a BIT and another international treaty to which the responding state is a party? More simply put, do states' investment obligations supersede the states' other international treaty obligations? Some authors speak of a "presumption of compliance with international law[,]" which posits that "the treaty parties would not have intended that their agreement offends existing rules of international law."[80] However, arbitral tribunals have rarely ruled in this manner, holding that while a state may have a responsibility to regulate to the standard of its international obligations, "it equally is beyond a doubt that the state holds responsibility towards the foreign investor for the breach of the provisions of the investment treaty"[81] if remedy of a regulatory shortcoming causes the violation. Often this type of claim arises, and is most critical for state policy space, when a respondent state asserts, in defense of a claim, that a regulatory measure disputed by an investor was intended to comply with a human rights obligation.

The complex relationship between relevant international human rights obligations and obligations owed to investors under a BIT requires an analysis of what rights and obligations each assigns, and to whom. International human rights law, including the ICCPR[82] and ICESCR,[83] and customary international law (CIL)[84] such as the responsibility to protect (R2P),[85] *jus cogens*, and *erga omnes*,[86] primarily create rights for people and obligations for states. IIAs create rights only for investors, and obligations for states to protect investors and investments. As the

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80. JACOB, *supra* note 8, at 28.

81. Brabandere, *supra* note 59, at 12.

82. ICCPR, *supra* note 35.

83. ICESCR, *supra* note 35.

84. BLACK'S LAW DICTIONARY (9th ed. 2014) ("International law that derives from the practice of states and is accepted by them as legally binding...This is one of the principal sources or building blocks of the international legal system.").

85. For more on R2P, *see, e.g.*, Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOR. AFF. 99, 102–03 (2002)

> The responsibility to protect implies a [state] duty to react to situations in which there is compelling need for human protection. If preventive measures fail to resolve or contain such a situation, and when the state in question is unable or unwilling to step in, then intervention by other states may be required.

86. *Jus cogens* are peremptory principles of international law that cannot be overridden by specific treaties between countries; that is: norms that admit of no derogation; they are binding on all states at all times, regardless of accession (e.g., prohibitions on aggression, slavery, and genocide). BLACK'S LAW DICTIONARY (9th ed. 2009)

SRSG wrote in 2007, international human rights treaties do not "impose direct legal responsibilities on corporations."[87] The responsibility to advance domestic human rights legislation and protect its citizens from harm is a responsibility that rests solely on state actors, which includes protecting citizens from harm caused by investors covered under a BIT.[88] It is easy to see how a conflict could arise between these obligations.

Some have questioned whether placing robust international legal obligations directly on investors would solve this dilemma. The SRSG himself, in referencing the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights*,[89] said that criticism of applying direct responsibilities on businesses through international law was appropriate because international law has not been "transformed to the point where it can be said that the broad array international human rights attach direct legal obligations to corporations."[90] International law is also ill-equipped to place direct legal obligations on businesses because the international judicial and monitoring mechanisms available for enforcement of any potential direct obligations is lacking.[91] While the CSR movement, driven in the area of domestic regulation by states like India with its mandatory corporate philanthropy tax,[92] is gaining ground, it is still a largely voluntary regime, and often national in context, not international.

While there is a lack of consensus amongst tribunals on when a state's international human rights obligations will pre-empt obligations under an investment agreement or excuse a violation of a BIT provision, preemptory *jus cogens* are an exception to the rule. In a case where a term in a BIT were interpreted to award a corporation damages as a result of a policy measure designed to prevent *jus cogens* violations, the Vienna Convention on the Law of Treaties would invalidate such interpretation.[93] Vienna Convention Article 53 states that "A treaty is void if, at the time of its conclusion, it conflicts with a

87. Report of the SRSG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc. ¶ 44, A/HRC/4/035 (Feb. 9, 2007). It should also be noted that corporations are now, as a result of some national CSR laws, and for other gross violations, being held accountable for actions which violate human rights, but this is not yet a common occurrence.

88. Patrick Dumberry & Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration*, 13 J. WORLD INV. & TRADE 349, 352 (2012).

89. UN Sub-commission on the Promotions and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Respect to Human Rights*, E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter U.N. Draft Norms].

90. Interim Report of the Special Representative of the Secretary-General of the United Nations on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises E/CN.4/2006/97 (Feb. 22, 2006).

91. *See* Castellino & Bradshaw, *Sustainable Development and Social Inclusion: Why a Changed Approach is Central to Combating Vulnerability*, WASH. INT'L L. J., 459, 467 (2015).

92. *See* Ananda Das Gupta, *Implementing Corporate Social Responsibility in India: Issues and the Beyond*, IMPLEMENTING CORPORATE SOCIAL RESPONSIBILITY: INDIAN PERSPECTIVES (Ray & Raju eds., 2014) (India has mandated a 2% tax on all businesses for corporate philanthropy purposes).

93. *See* Vienna Convention on the Law of Treaties, Jan. 27 1980, 1155 U.N.T.S. 331 (1980).

peremptory norm of general international law."[94] A case presenting such a scenario is unlikely to occur, however it does highlight an interesting distinction; provisions within international human rights treaties which have grown to become preemptory norms, such as ICCPR Article 8 prohibiting slavery, torture, and forced labor,[95] supersede any BIT-based right an investor could claim if conflicting. Additionally, investors may be held directly accountable for violations of *jus cogens* norms these norms under international law.[96]

While conflict of law issues are fundamental to this discussion, there are very few arbitral tribunals who have ruled directly on them, most seeking to decide such cases on procedural issues.[97] In *Azurix Corp. v. the Argentine Republic*, the tribunal gave no consideration to the fact that Azurix failed to make repairs of a water treatment facility causing an outbreak of dangerous algae in the provincial water system,[98] which Argentina claimed was a "violation of its citizens' right to water[.]"[99] The tribunal ultimately did not directly address Argentina's human rights claim, or provide a holding on the conflict of law issue. The arbitrators merely issued a judgment in favor of the corporation on the basis of unfair and arbitrary treatment under an FET standard.[100] The tribunal did declare a position in the conflict of law debate, albeit unintentionally; by ignoring the petitioners claim relating to human rights violations the tribunal made it clear that it is acceptable for arbitrators to ignore other obligations outside the scope of the IIA's express mandate.

In the few cases which do affirmatively consider human rights obligations, most tribunals "seem to be very cautious in elevating human rights laws to the same status of investment protections[,]"[101] and are "are generally reluctant to accord significant weight to human rights."[102] In fact, "no investment tribunal has absolved a [state] that has encountered inconsistent human rights obligations from its investment obligations, or reduced the amount of compensation paid."[103] While it is true that as a general policy "[s]tates are not liable to pay compensation to a

94. *Id.*

95. ICCPR, *supra* note 35, art. 8.

96. ICCPR, *supra* note 35, art. 8.

97. JACOB, *supra* note 8, at 30.

98. Azurix v. Argentina, ICSID Case No. ARB/01/12, IIC 24, Award, ¶ 124 (July 14, 2006).

99. U.N. Committee on Economic Social and Cultural Rights, General Comment No. 15, ¶ 39–44, U.N. Doc. E/C.12/2002/11 (Nov. 29, 2002).

100. *See* Azurix, *supra* note 98, at Executive Summary. Also, in a similar case against Argentina, Vivendi v. Argentina, ICSID Case No. ARB/03/19, Decision on Liability (July 30, 2010), the tribunal did not rule on the conflict of law issue. These cases are some of the primary reasons Argentina is currently voiding their BITs.

101. Claire Cutler, *Human rights Promotions through Transnational Investment Regimes: An international Political Economy Approach*, 1 POLITICS & GOVERNANCE 16, 27 (2013).

102. Moshe Hirsch, Int'l L. Forum at the Hebrew Univ. of Jerusalem, *The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective*, Research Paper no. 06-13, at 228 (2013).

103. *Id.* at 218.

foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare[,]"[104] few arbitral tribunals are keen to adopt this holding if language in the agreement creating such a protection is not explicit.[105]

In a slight exception to the rule, some recent tribunals have endorsed the 'clean hands' doctrine,[106] giving the English common-law rule weight in arbitral proceedings. The doctrine may be successfully cited as a state defense when investors are alleged to have directly contributed to a human rights violation.[107] If a tribunal comes to the conclusion that an investor has committed a human rights violation in relation to the disputed investment, it could find the investor's claim inadmissible as a matter of jurisdiction.[108] A number of tribunals have denied that they have the jurisdiction to hear claims on the basis inadmissibility due to lack of 'clean hands' for committing acts such as fraud and bribery in the course of the investment.[109] This should assuage some human rights concerns, but as the application of this doctrine is not yet widespread states may still fear that investors with poor human rights records may be awarded damages as a result of a suit alleging inequitable regulation of their practices, leading to a regulatory chilling effect.

One scholar contends that, from a sociological perspective, it is "not surprising that investment tribunals are generally reluctant to accord significant weight to human rights treaties in international investment law[,]" because the "relationships between the social settings involved in human rights laws and investment laws reveal a considerable socio-cultural divide."[110] It is possible that including in BITs explicit references to international human rights treaties, or to international law in general, could bridge not only the socio-cultural gap between these two legal regimes, but also reduce the potential conflicts between them.[111] Additional instruction in the language of IIAs themselves is necessary to direct tribunals to engage with international human rights instruments in the case of a conflict, and in the case of allegations of violations by investors.

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104. Saluka Invs. BV v. Czech Republic, UNCITRAL Arb., Partial Award, ¶ 255 (Mar. 17, 2006).

105. BITs which include this language explicitly in the general exceptions provisions are discussed in section VI.

106. Patrick Dumberry & Gabrielle Dumas-Aubin, *How to Impose Human Rights Obligations on Corporations Under Investment Treaties? Pragmatic Guidelines for the Amendment of BITS*, Y.B. ON INT'L L. & POL'Y 575, 575 (2011-2012) (Karl P. Sauvant ed., 2012).

107. *Id.*

108. *Id.* at 589.

109. *See* Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Award ¶ 96 (Aug. 27, 2008); Inceysa Vallisolentana, S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award ¶ 92 (Aug. 2, 2006); World Duty Free Company Limited v. Kenya, ICSID Case No. ARB/00/7, Award ¶ 157 (Oct. 4, 2006).

110. Hirsch, *supra* note 102, at 228–29.

111. Examples of how this can be accomplished follow in section VI.

VI. UNGP ARTICLE 9

UNGP Article 9 specifically recommends that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts."[112] The SRSG's commentary agrees that while IIAs create economic opportunities for states, "they can also affect the domestic policy space of governments."[113] As an example, the commentary explains that "the terms of [IIAs] may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so."[114] The SRSG recommends that states retain "adequate policy and regulatory ability to protect human rights"[115] when drafting BITs, while balancing that with the need to provide "necessary investor protections."[116]

Some scholars argue that the UNGP was a failure, and fault the SRSG for catering to industry efforts to stall the progress of sustainable development efforts.[117] These scholars claim that by not creating positive obligations on investors, the UNGP will not be effective in advancing human rights. Why does the UNGP merely require that states maintain 'domestic policy space' to regulate human rights, and not recommend that IIA's include requirements that states implement specific regulations or that investors maintain certain standards? The answer is two-fold.

First, positive obligations exist in other international human rights agreements, such as the ICCPR[118] and the ICESCR,[119] which are open for accession, and which many nations have eruditely signed. States who accept and accede to international human rights treaties are typically required to maintain domestic regulations implementing the standard set by the provisions of the agreement. For nations not bound by these agreements, *jus cogens* and *erga omnes* still apply.[120] In both situations states are bound by these obligations, however the duty to correct lax domestic enforcement is entrusted in the UN and the UN Security Council,[121] not in investor-state arbitral tribunals. From the perspective of

112. UNGP, *supra* note 1, art. 9.

113. *Id.* art. 9, Commentary.

114. *Id.*

115. *Id.*

116. *Id.*

117. ICCPR, *supra* note 35.

118. Positive obligations in the ICCPR include; the regulations on use of the death penalty in art. 6, the prohibition on torture in art. 7, and the prohibitions on slavery, servitude, and compulsory labor in art. 8. ICCPR, *supra* note 35.

119. Positive obligations in the ICESCR include; the right to work in art. 6, the right to collective bargaining art. 8, and the requirement of improving all aspects of environmental and industrial hygiene in art. 12. ICESCR, *supra* note 35.

120. *See* Vienna Convention on the Law of Treaties, Jan. 27 1980, 1155 U.N.T.S. 331 (1980).

121. *Id.*

international law, positive obligations in IIA's would allow arbitral tribunals to rule on subject matter far outside of the scope of their mandates.

Second, each state is a sovereign nation with the power to exercise control over its territory,[122] and hence is generally free to select its own regulatory regime. Specific recommendations from the UNGP could invade this right. The SRSG selects the term policy space as a means of recommending the implementation of language into IIA's which will reduce restrictions placed on a host states ability to make legitimate policy decisions regarding human rights regulation, while not mandating that any specific regulatory changes be made. The choice is left to each state to develop their domestic regulations in compliance with international human rights standards.

In an ideal-world, each state would be an efficient, effective actor, with the power to regulate and enforce domestic human rights regulations, and the will do to so. This ideal state would always fulfill its internationally binding obligations to protect its citizens as required by the international instruments they are party to, and would therefore would be best positioned to regulate investors operating within in its sovereign territory.[123] UNGP Article 1 even recognizes the state responsibility to protect as a core duty which guides the remainder of the recommendations.[124]

The ideal scenario for a developing state which completely and effectively implements UNGP Article 9 recommendations into its BIT regime is as follows. The developing nation proliferates a progressive BIT regime, effectively catalyzing growth in FDI inflows, kick-starting its economy. As a result of the FDI boom, the state's available financial resources increase and are allocated to the development and enforcement of domestic regulations. State citizens then enjoy increased quality of life resulting from economic development coupled with increased protection from harms caused by investment.

In the current geopolitical system, some states can effectively regulate and enforce domestic prohibitions on human rights abuses, but many cannot.[125] "Because of the overwhelming economic power"[126] of some foreign investors, many states, particularly developing nations, may not have the resources to effectively regulate or enforce human rights laws.[127] Additional capacity building and resource sharing is required to overcome this gap.

The UNGP recommendation expressly allows for a case-specific and differentiated analysis of policy space to be done by each state internally. It refrains from infringing on state sovereignty or creating obligations which cannot be adequately implemented. If policy space is the answer, the real question then

122. U.N. Charter art. 2, ¶ 1.
123. Dumberry & Dumas-Aubin, *supra* note 88, at 352.
124. UNGP, *supra* note 1, art. 1.
125. Dumberry & Dumas-Aubin, *supra* note 88, at 371.
126. *Id.* at 352.
127. *Id.*

becomes, what is the best way for states to effectively heed the UNGP Article 9 recommendations and maintain domestic policy space to regulate human rights when engaging in IIAs?

VII. MAINTAINING POLICY SPACE IN IIAS

There are numerous ways to ensure that when engaging in an IIA a state protects its domestic policy space to regulate human rights, some of which are evidenced in state practice.[128] Structurally, states can renegotiate existing BITs, void their BITs and draft entirely new ones, or implement interpretative addendums to existing treaties that clarify provisions.[129] Interpretive language can be inserted into provisions to clarify ambiguous terms of art; traditional provisions can be expanded to provide additional protections for human rights and policy space; additional provisions can be added which explicitly protect governmental policy space; and, most controversially, positive obligations can be inserted into BITs which place direct responsibilities on corporations and states to protect human rights. The following sections present various methodology, as utilized by some existing IIAs and models.

Section A briefly questions the efficacy of two untenable options which have been recommended; section B discusses additional language that can be inserted into agreements; section C analyzes interpretive language that can be included in troublesome provisions; section D considers general exceptions provisions; section E highlights potential additional provisions which can be added to bolster the treaty, although not all are recommended for use therein.[130]

a. Untenable Options

There are several unrealistic and untenable methods which have been suggested to universalize international investment law in a way that would reduce the regulatory chill and assist states in better maintaining domestic policy space to regulate human rights. A global Multilateral Agreement on Investment (MAI) has been proposed and rejected twice, most recently one that was developed by the Organization for Economic Co-operation and Development (OECD) in 1995.[131] A global MAI, complete with robust provisions protecting domestic policy space, would go a long way to alleviating the regulatory chill. A global MAI is untenable, simply because all nations have different needs, and as recent history shows, even smaller 'dozen-nation' IIAs such as the Trans-Pacific Partnership Agreement take years to develop.[132]

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128. JACOB, *supra* note 8, at 33.

129. JACOB, *supra* note 8, at 33.

130. This section proceeds without distinction between 'void and re-draft' and 'renegotiation' methods of adapting agreements.

131. Organization for the Economic Co-operation and Development, Multilateral Agreement on Investment Draft Consolidated Text, DAFFE/MAI(98)7/REV1, 95 (Apr. 22, 1998) (not enacted).

132. IAN F. FERGUSSON ET AL., CONG. RESEARCH SERV., 7-5700, THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (TPP): IN BRIEF, summary (Feb. 9, 2016) (It took 5 years of negotiation to

Others have suggested amending the International Centre on the Settlement of Investment Disputes between States and Nationals of other States Convention (ICSID convention), which arbitrates a vast majority of investment disputes, in order to allow tribunals to consider international human rights law when hearing cases.[133] Most scholars agree that amending this treaty is 'nearly impossible', as it has not been changed since 1965 and has resisted other more spirited attacks on its severe rigidity.[134]

This is not to say that neither of these changes cannot be accomplished; only that it would be exceedingly difficult.

b. Preambular Language

Preambular language referencing international human rights treaties, principles of international law, or other international obligations may help states maintain domestic policy space in IAAs. While preambular language is not binding, it can be important in arbitral interpretation.[135] It allows tribunals to adopt an approach that places more weight on international human rights treaties, even if not explicitly controlling.[136]

A preamble proffered by the South African Development Community Model Bilateral Investment Treaty (SADC Model) includes a recognition that sustainable development led by FDI can encourage the "furtherance of human rights and human development."[137] It also states that

> [r]eaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the measures in place—the particular need of developing countries to exercise this right[.][138]

This paragraph highlights three important things. First, that states have a *right to regulate* and meet national policy objectives, explicitly creating state rights under the IIA. Second, that there may be *asymmetries* in domestic legislation which need to be corrected, noting that investors should expect future regulation to shore-up those asymmetries. This language is adapted from the World Trade Organization's General Agreement on Trade in Services (WTO GATS),[139] which

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agree on a final publishable draft of the TPP); MAUDE BARLOW & TONY CLARKE, MAI AND THE THREAT TO AMERICAN FREEDOM (1998).

133. Dumberry & Dumas-Aubin, *supra* note 88, at 358.

134. *Id.* at 578; CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY art. 65 (2d ed. 2009). Also, while this author (I) notes that it is illogical, and usually failure-inspiring, to assume that anything which has not been accomplished in a long time is impossible, it is justifiable in this situation.

135. JACOB, *supra* note 8, at 34.

136. Dumberry & Dumas-Aubin, *supra* note 88, at 359.

137. SADC Model, *supra* note 54.

138. *Id.* (emphasis added).

139. World Trade Organization, General Agreement on Trade in Services (GATS).

many developed nations are party to, and therefore "is likely to be universally accepted."[140] Third, that this is especially true for *developing states* who are just beginning to regulate.

The preamble to the Model International Agreement on Investment for Sustainable Development (IISD Model)[141] makes no explicit reference to human rights, instead focusing on sustainable development and existing international law. It begins by stating that the goal of the agreement is to promote *sustainable development* through investment,[142] defining sustainable development as per the 1992 Rio Declaration.[143] The IISD Model preamble continues by "affirming the progressive development of international law and policy on the relationships between enterprises and host governments as seen in...the [ILO Declaration],[144] the OECD Guidelines for Multinational Enterprises,[145] and the [UN Draft Norms].[146] The preamble adds that it is "seeking an overall balance of rights and obligations in international investment between investors, host countries and home countries,"[147] which is language that strikes right at the heart of the issue while leaving appropriate room for states and investors to perceive both benefits and obligations.

The clear majority of other national model agreements do not explicitly assert human rights or international legal instruments in the preamble. The US Model states that it desires to increase investment "in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights."[148] State regulation of international obligations under labor treaties is crucial to advancing sustainable development, and they are likely be applicable in arbitral disputes, however preambular language of this kind does not create an explicit recognition that labor rights supersede investor rights under an IIA.

Other nations' model agreements are less robust. The Canadian Model BIT preamble has just one provision which references a desire to promote sustainable

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140. *Id.*

141. International Institute for Sustainable Development, Model International Agreement on Investment for Sustainable Development (2005) [hereinafter IISD Model] (developed by the International Institute for Sustainable Development [hereinafter IISD]).

142. *Id.* at preamble.

143. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol.I), Annex I (Aug. 12, 1992) (sustainable development is defined as "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.").

144. International Labor Organization Declaration on Fundamental Principles and Rights at Work and its Follow-up, Annex 1, 27A.Doc/v3 (June 19, 1998).

145. Organization for Economic Co-operation and Development, Guidelines for Multinational Enterprises (2008).

146. U.N. Draft Norms, *supra* note 89.

147. IISD Model, *supra* note 141, at preamble.

148. SADC MODEL BIT, *supra* note 54.

development,[149] the German Model BIT preamble merely recognizes that encouraging investment is "apt to stimulate...the prosperity of both nations[,]"[150] and the French Model BIT preamble has no reference to sustainable development, human rights, or labor rights.[151]

Other European nations have been more inclusive when drafting model BIT preambles. One of the most progressive national model BITs, which was never formally adopted, is the 2007 Norwegian Draft Model BIT. Its preamble has a number of paragraphs which collectively highlight the importance of "health, safety, and the environment[,]" "internationally recognized labor rights[,]" "corporate social responsibility [(CSR)][,]" "obligations under international law[,]" "human rights and fundamental freedoms[,]" "principles set out in the [UN] Charter and the [UDHR][,]" and "provisions of international agreements relating to the environment[.]"[152] The breadth of its preambular reference to human rights and international law may have been why this model was never formally adopted.

The Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area (COMESA IA) is one of the most progressive active IIAs.[153] It is in use by nations in the Southern African regional association, including South Africa. In preface to its 'Part Two', which contains substantive rights and obligations of investors, the COMESA IA expressly requires an "overall balance of rights and obligations between investors and Member States."[154]

Preambular language is effective at presenting the object and purpose of the treaty, and may be considered by arbitral tribunals when interpreting the intent of ambiguous language in a provision of an IIA. Most importantly however, it is, invariably, non-binding. For a state to effectively maintain domestic policy space to regulate human rights, it must look beyond the preamble of the IIA.

c. Interpretive Language

Several progressive BITs and IIAs include additional interpretive language defining the intended scope and meaning of BIT provisions. Frequently, this language is added to traditional treatment provisions to clarify ambiguous terminology and standards. Interpretive language is most effective in defining and clarifying language in treatment provisions.

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149. Canada Model Treaty for the Promotion and Protection of Investments (2004) [hereinafter Canada Model].

150. German Model Treaty Concerning the Encouragement and Reciprocal Protection of Investments (2008) [hereinafter German Model].

151. Draft France Model Agreement on the Reciprocal Promotion and Protection of Investments (2008) [hereinafter France Model].

152. Norway Draft Agreement for the Promotion and Protection of Investment (2007) [hereinafter Norway Model].

153. Common Market for Eastern and Southern Africa, Investment Agreement for the COMESA Common Investment Area art. 11, Rmm/(07) (2007) [hereinafter COMESA IA] (this agreement is progressive throughout its text).

154. *Id.*

1. Interpretive Language in National Treatment and MFN

The Association of Southeast Asian Nations Comprehensive Investment Agreement (ASEAN CIA) requires host states to accord investors "treatment no less favourable than that it accords, *in like circumstances*, to its own investors[.]"[155] The language 'in like circumstances' "ensure(s) that a broad view is taken, rather than simply a narrow question of whether the investors are in the same or related or competitive sector."[156] This additional text "ensures the *reasons* for any measures can be fully considered" by tribunals.[157]

The limitation of the language 'in like circumstances' is that it leaves the interpretation of what 'like circumstances' should include to the discretion of the tribunal. The COMESA IA has the same language as the ASEAN CIA, but adds that "[f]or greater certainty, references to 'like circumstances' in paragraph 1 of this Article requires an overall examination on a *case by case* bases of all the circumstances of an investment."[158] It explains that the circumstances of an investment include; "its effects on third persons and the local community[,]" "effects on the [environment][,]" its sector, the "aim of the measure concerned[,]" the common regulatory process applied to the type of measure, and other factors.[159] Few modern BITs contain interpretive language as comprehensive as the COMESA IA.[160]

Some progressive national treatment and MFN provisions include additional language which limits the scope of application to specific investor actions. The Finland – Zambia BIT guarantees investors national treatment with respect only to "the acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposal of investments."[161] By limiting the scope of non-discrimination provisions within each clause the state can exclude claims to "existing or new measures that may be inconsistent with the non-discrimination obligations."[162] Similarly, many progressive national treatment and MFN provisions include additional qualified exemptions for non-conforming measures, taxation, and other international investment treaties to which the state may be a

155. Association of South East Asian Nations Comprehensive Investment Agreement art. 5, Feb. 26, 2009, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3095 [hereinafter ASEAN CIA or CIA] (emphasis added).

156. SADC MODEL, *supra* note 54, art. 4.

157. *Id.* (emphasis added).

158. COMESA IA, *supra* 153, art. 17 (emphasis added).

159. *Id.*

160. *E.g.*, Agreement for the Promotion and Protection of Investments, Can.-Kuwait, Sept. 26, 2011, 2014 Can. T.S. No. 2014/5, http://investmentpolicyhub.unctad.org/IIA/country/35/treaty/788 (The national treatment provision does include the language 'like circumstances,' but does not have any defining clause).

161. Agreement between the Government of the Republic of Finland and the Government of the Republic of Zambia on the Promotion and Protection of Investments, Fin.-Zam., art. III, ¶ 2, July 9, 2005, http://investmentpolicyhub.unctad.org/IIA/country/232/treaty/1552 (not in force).

162. SADC MODEL, *supra* note 54.

party.[163]

Other BITs explicitly list ways in which the state can be found to have provided 'treatment less favorable' to the exclusion of others possible ways. The Germany – Oman BIT list includes, among others, that treatment less favorable may include "unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country."[164]

For a state to effectively reduce restrictions on its domestic policy space regarding human rights obligations, the minimum language recommended for a national treatment or MFN clause would be something similar to US Model Article 3. This provision includes a 'like circumstances' requirement, limits the scope of the provision to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment[,]" and has exceptions for regional government treatment.[165] National treatment and MFN provisions are not the only ones which cause worry for states; FET and FPS provisions also have a profound effect on policy space.

2. Interpretive Language in FET and FPS

The use of interpretive language in FET provisions often expressly directs tribunals to apply provisions in a manner that is the least restrictive of the host state's domestic policy space. Due to the generally risky nature of unqualified FET provisions, the inclusion of interpretive language in these provisions may be the single most effective method by which states can protect their policy space.

Among the common qualifiers added to these provisions is language explaining that "treatment [is] in accordance with customary international law[.]"[166] This language clarifies that FET does not require treatment beyond the minimum required by CIL.[167] However, this is often confusing to tribunals because "there are further difficulties in determining precisely what standard is required by [CIL]."[168] In the US Model, following basic FET and FPS provisions,[169] a longer explanatory clause states that "for greater certainty, paragraph 1 prescribes the customary international law *minimum* standard of treatment of aliens as the

163. *See, e.g.*, Treaty between the Federal Republic of Germany and the Sultanate of Oman concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Oman, art. 3, ¶ 4–7, May 30, 2007, 1475 U.N.T.S. 261, http://investmentpolicyhub.unctad.org/IIA/country/159/treaty/1731.

164. *Id.* ¶ 3 (addressing "measure[s] that have to be taken for reasons of public security and order, public health or morality[,]" by exempting those from the provisions requirement).

165. U.S. Model, *supra* note 40, art. 3.

166. *Id.* art. 5, ¶ 1.

167. BONNITCHA, *supra* note 7, § 3.2.1.

168. *Id.*

169. U.S. Model, *supra* note 40, art. 5, ¶ 1 ("Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.").

minimum standard of treatment to be afforded to covered investments."[170] It continues, "the concepts of [FET] and [FPS] do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."[171] This explanation distinctly qualifies FET and FPS, explicitly prohibiting some ways in which investors have been able to file illegitimate claims, such as by claiming 'regulatory stability', which is not required by CIL.

"By limiting the source of FET to [CIL], these treaties seek to rein in the discretion of tribunals" and says "to arbitrators that [they] cannot go beyond what [CIL] declares to be the content of the minimum standard of treatment."[172] The US Model goes even further by specifically defining FET as "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;"[173] and defines FPS as requiring "each Party to provide the level of police protection required under [CIL]."[174]

The COMESA IA approaches this issue from a different perspective. It states that FET is merely the minimum standard required under CIL, but adds "[s]tates understand that different [states] have different forms of administrative, legislative and judicial systems, and that [states] at different levels of development may not achieve the same standard at the same time."[175] While this provision does leave more decisions to the discretion of tribunals, it allows them to consider more broadly the needs of developing nations when applying the FET standard.

The recently published TPP[176] stipulates the minimum standard of treatment owed to covered investments is "treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security."[177] This language qualifies FET and FPS as merely subsets of customary international law principles. The TPP states that, "[f]or greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments," and continues by stipulating that "[t]he concepts of [FET] and [FPS] do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."[178]

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170. *Id.* ¶ 2 (emphasis added).

171. *Id.*

172. United Nations Conference on Trade and Development, *Fair and Equitable Treatment,* U.N. Doc. UNCTAD/DIAE/IA/2011/5, at 28 (2012).

173. U.S. Model, *supra* note 40, art. 5, ¶ 2a.

174. *Id.* ¶ 2b.

175. COMESA IA, *supra* note 153, at art. 14.

176. TPP, *supra* note 132. The agreement, negotiated between nations representing 40% of the world's economy, is far from guaranteed to be implemented as of now, but presents some exceptional examples of policy space protective language. TPP signatory nations are: The United States, Canada, Mexico, Peru, Chile, Japan, Singapore, Malaysia, Vietnam, Brunei, Australia, and New Zealand. As of December 2016, it seems likely that the TTP will not go into effect.

177. *Id.* art. 9.6(1).

178. *Id.* art. 9.6(2).

To ensure that tribunals consider the minimum standard of treatment as the lowest possible standard required under international law, the TPP expressly defines FET as including "the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world[,]"[179] and FPS as requiring "each Party to provide the level of police protection required under customary international law."[180]

The TPP also directly addresses concerns of civil society that 'legitimate expectation' claims can still be brought under a partially qualified FET provision; "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."[181] It states further that "[f]or greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."[182] This reduces fears that states may place themselves at risk by using subsidies or grants to attract investment or incentivize good behavior.

The SADC Model recommends against the inclusion of any FET standard, instead suggesting a 'fair administrative treatment' standard be used.[183] Fair administrative treatment requires that, *taking into account the level of development*, "administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies justice."[184] It also guarantees that investors will be "notified in a timely manner of administrating or judicial proceedings that directly affect investment"; that there exists a "right of appeal"; that investors will have "access to government-held information" in a timely manner; and that states will "progressively strive to improve the transparency, efficiency, independence, and accountability" of their governmental processes.[185]

As a more traditional alternative, the SADC Model does provide an example of a reduced FET standard for use if needed, which requires "the demonstration of an act or action by the government that are an outrage, in bad faith, a willful neglect of fury or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency."[186] Even this standard, the SADC posits, can lead to unintended claims.[187]

Only South Africa and other COMESA state have even considered adopting

179. *Id.* art. 9.6(2)(a).
180. TPP, *supra* note 132, art. 9.6(2)(b).
181. *Id.* art. 9.6(4).
182. *Id.* art. 9.6(5).
183. SADC MODEL, *supra* note 54, art. 5.
184. *Id.* art. 5.1 (option 2).
185. *Id.* art. 5.2–5.5 (option 2).
186. *Id.* art. 5.2 (option 1).
187. *Id.* art. 5.

the SADC Model's fair administrative treatment requirements.[188] Some of the interpretive language presented in the US Model, the TPP, and other progressive model BITs is becoming more commonly used. The addition of interpretive language into existing provisions in IIAs may be the most effective method of maintaining domestic policy space to regulate human rights, but other changes are also possible.

d. General Exceptions Provisions

Most IIAs include a general exceptions provision which exempts certain types of regulatory measures from application. Common exceptions include those for non-conforming measures, taxation, and national security.[189] The Canada Model BIT specifically addresses issues with policy space in its general exceptions provision, emphasizing that the guarantees therein do not apply to a party enforcing measures to "protect human, animal or plant life or health[,]" taking action "in pursuance of its obligations under the [UN] Charter[,]" or to any investments in "cultural" industries.[190] The last requirement, for actions relating to any cultural industries, can be especially protective of human rights policy space because of the potentially sensitive rights involved, such as those enumerated in the ICCPR and CERD.[191]

Another approach, adopted by the US Model, is to not include a single general exceptions clause, but to provide separate provisions which create exceptions specifically for taxation, non-conforming measures, national security, financial services industries, and ones which intend to reduce regulatory chill.[192] The TPP follows in a similar vein, mandating that no investment provisions "shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with *this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives."[193] The most confounding approach is evident in the ASEAN CIA, which merely exempts from application of the IIA any measures "necessary to secure compliance with laws or regulations which are not inconsistent with this agreement."[194] It is unclear what measures would be inconsistent with the agreement itself, leaving this determination to the discretion of the tribunal.

188. The SADC MODEL was heavily considered in the drafting of the COMESA IA, over which South Africa had a great influence.

189. *See* Agreement Between the Government of Japan and the Government of the Republic of the Union of Myanmar for the Liberalization, Promotion and Protection of Investment art. 7, Japan-Myan., Dec. 15, 2013, http://investmentpolicyhub.unctad.org/IIA/country/105/treaty/2155.

190. Canada Model, *supra* note 149, art. 10.

191. *See generally* ICCPR, *supra* note 35; International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 (1966).

192. U.S. Model, *supra* note 40, *passim.*

193. TPP, *supra* note 132, art. 9.15 (emphasis added).

194. ASEAN CIA, *supra* note 155, art. 17.

e. Additional Approaches

There are two categories of novel provisions, less common than those previously presented, which are intended to maintain state domestic policy space. The first category is one of 'passive provisions'; those which provide exceptions for certain industries, types of activity, or sectors, like the approach taken by the US Model.[195] Included in this category are inventive provisions which are likely to be effective, and be universally accepted by states.

Several scholars and international organizations have also recommended the inclusion of provisions from a second category, those which place 'positive obligations' on states and investors in a few specific areas of international law, including human rights, labor rights, environmental protection, and anti-corruption.[196] These provisions are more aggressive and more controversial. They expand international legal obligations of states and have a larger negative financial impact on investors.

1. 'Passive Provisions'

One passive provision, which is arguably successful at preventing a regulatory 'race to the bottom',[197] requires that member states "not waive or otherwise derogate from or offer to waive or otherwise derogate from measures concerning labour, public health, safety or the environment as an encouragement for the establishment, expansion or retention of investments."[198] While this does eliminate the ability of states to reduce regulations to attract investment, it has no protection for states who wish to improve their regulations from the current baselines. Most BITs are concluded between developing and developed nations,[199] providing little benefit to the developing nation where human rights abuses are more likely to occur due to weak regulation and inadequate enforcement.[200]

The SADC Model recommends the inclusion of a 'right to regulate' clause as a stand-alone provision in BITs;[201] "In accordance with [CIL] . . . the Host State has the *right* to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and

195. U.S. Model, *supra* note 40, art. 14–21.

196. Dumberry & Dumas-Aubin, *supra* note 88, at 356–58; *see, e.g.*, SADC MODEL, *supra* note 54, art. 13 (placing pre- and post-entry impact assessment requirements on states and investors).

197. *Definition of race to the bottom*, FINANCIAL TIMES LEXICON, http://lexicon.ft.com/Term?term=race-to-the-bottom (last visited Apr. 20, 2015) ("The situation in which companies and countries try to compete with each other by cutting wages and living standards for workers, and the production of goods is moved to the place where the wages are lowest and the workers have the fewest rights").

198. COMESA IA, *supra* note 153, art. 5.

199. J ANTHONY VANDUZER ET AL., INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE FOR DEVELOPING COUNTRIES (Aug. 2012), https://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf.

200. *Id.*

201. SADC MODEL, *supra* note 54, art. 20.

with other legitimate social and economic policy objectives."[202] This provision explicitly protects policy space relating to measures designed to advance sustainable development, which are often directly related to measures seeking to regulate human rights.[203] The IISD Model has a similar provision in Article 25 titled "[i]nherent rights of states[,]" and recommends that this clause, when included, should be featured in a stand-alone provision. [204]

The TPP, in an effort to increase the number of enterprises voluntarily employing internal CSR programs, states that parties "reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party."[205] While this does not create any mandatory obligations, it is one of the first such clauses included in an active IIA, highlights the importance of social issues, and reaffirms the notion that investors have a responsibility to people in the countries in which they operate.

Passive provisions can benefit states seeking to maintain domestic policy space. Many of these inventive provisions, while quite uncommon, are efficient at addressing state concerns without creating significantly burdensome fears for investors. Nonetheless, some progressive IIAs go further, prescribing positive obligations on both states and investors.

2. Positive Obligations

The inclusion of positive obligations in IIAs as a method for maintaining domestic policy space to regulate human rights is controversial. Provisions of this type are diverse. They include provisions requiring recognition of environmental impact from investments,[206] specifically requiring parties to reaffirm their obligations to the ILO and other international treaties,[207] requiring both pre-entry and post-entry impact assessments on investments,[208] and creating direct human rights obligations. Some of these provisions are more widely accepted, such as those in the US Model; some are less widely accepted, such as those in the SADC Model.

A. Reference to Human Rights and Labor Treaties

One method by which a BIT may implicate international labor rights or human rights without directly obligating a state to bring its domestic regulations in

202. *Id.* (emphasis added).
203. *Id.*
204. IISD Model, *supra* note 141, art. 25.
205. TPP, *supra* note 132, art. 9.17.
206. U.S. Model, *supra* note 40, art. 12.
207. *Id.* art. 13.
208. SADC MODEL, *supra* note 54, art. 13.

line with international labor standard[209] is to implement language similar to the US Model. US Model Article 13 requires that parties "reaffirm their respective obligations as members of the International Labor Organization (ILO) and their commitments under the [ILO Declaration]."[210] While this provision does not create additional substantive obligations or new grievance mechanisms, it does highlight the importance of international labor rights. [211] It also requires that states not weaken or reduce protections afforded by domestic labor laws or fail to enforce domestic laws as an encouragement for investment.[212]

COMESA IA Article 22 states that "nothing in this agreement shall be construed to preclude a [state] from applying measures that it considers necessary for its obligations under the [UN] Charter...with respect to the protection of its own essential security interests."[213] This type of provision can be expanded to include any international agreement. TPP Article 19.3 states that "each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration."[214]

This type of provision creates obligations through reference to existing international law, but there is no consistent pattern of arbitral tribunal interpretation to discern the effect this will have on increasing policy space.

B. Direct Human Rights Obligations

The most controversial provisions are those which create direct human rights obligations on states and investors without direct reference to a treaty. SADC Model requires that "[i]nvestors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights."[215] The IISD Model repeats this language and adds a clause which may be interpreted to expressly dictate that international human rights treaty obligations supersede BIT obligations; "Investors and Investments shall not manage or operate...in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties."[216]

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209. Jeffrey S. Vogt, *Trade and Investment Arrangements and Labor Rights*, CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS: NEW EXPECTATIONS AND PARADIGMS (Lara Blecher, et. al. eds., 2014).

210. U.S. Model, *supra* note 40, at art. 13; ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, June 15, 2010, http://ilo.org/declaration/info/publications/WCMS_467653/lang—en/index.htm.

211. U.S. Model, *supra* note 40, art. 13.

212. *Id.*

213. COMESA IA, *supra* note 153, art. 22.

214. TPP, *supra* note 132, art. 19.3. This chapter of the TPP is binding on states and investors and is relevant to all investment provisions.

215. SADC MODEL, *supra* note 54, art. 15.

216. IISD Model, *supra* note 141, art. 14.

TPP chapter 19 expressly enumerates its own prohibitions, closely related but not identical to, the ILO Declaration Fundamental Principles; "each Party [recognize] the goal of eliminating all forms of forced or compulsory labour, including forced or compulsory child labour."[217] The TPP also expressly encourages businesses operating under the IIA to move to a forced labor free supply and manufacturing chain; each party is to "discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour."[218]

These provisions may help to reduce, and in some cases explicitly prevent, the chilling effect in designated policy areas. Most investors, however, fear the uncertainty of broad and unqualified language which may allow a state to act in a truly arbitrary or unfair manner.

C. Essential Elements Clause

The EU-Central America BIT (EUCAA) includes an 'essential elements' clause, which explicitly references human rights law.[219] The EUCAA states that "[r]espect for democratic principles and fundamental human rights, as laid down in the [UDHR]," and for the principle of the rule of law, underpins the internal and international policies of both parties and constitutes an *essential element* of this agreement.[220] While most of the fundamental UDHR obligations have become *jus cogens* norms, and therefore already enforceable in investment arbitration, the remainder of the treaty has a relatively "high level of human rights protection in relation to the rights mentioned" in BITs.[221] The inclusion of an essential elements clause protects the host states ability to regulate the worst human rights offenses perpetrated by business, and meet UDHR standards, without radically altering substantive language found in traditional BITs.

D. Impact Assessments

The IISD Model[222] and SADC Model[223] BITs suggest provisions requiring pre-entry and post-entry impact assessments, however few national model BITs or existing BITs contain them. Impact assessment requirements expressly codified in

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217. TPP, *supra* note 132, art. 19.3.

218. *Id.* art. 19.6.

219. Agreement Establishing an Association between Central America, on the one hand, and the European Union and its Member States, on the other, 2012/734, 2012 O.J. (L 346) 1, http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147660.pdf.

220. *Id.* (emphasis added).

221. Inta Droi, *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements* 9 (Feb. 13, 2014), http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dv/study_hr_tradeagreements_/study_hr_tradeagreements_en.pdf.

222. IISD Model, *supra* note 141, art. 12.

223. SADC MODEL, *supra* note 54, art. 13.

BITs are helpful in theory, but most of the examples merely require assessments "as required by the laws of the Host State[.]"[224] There is not much purpose in creating additional burdens on investors when the assessment requirements are "consistent with domestic law in virtually every State today."[225] States seeking to enhance domestic regulations relating to pre-entry impact assessment requirements may fear that the regulatory adjustment would violate obligations under its BITs. However, if assessment standards in the IIA merely match the standards of the host state's domestic regulations, no additional policy space would be created, and the assessment requirements would be toothless. In these situations, general exceptions for environmental and human rights regulations, as discussed previously, would be more effective.

Few of these additional positive obligations are likely to be commonly used; many would assign arbitral tribunals topics for consideration outside of their mandated scope. Some passive provisions are tenable options for inclusion, particularly the 'essential elements' clause. In general, whether through preambular provisions, interpretive language, general exceptions clauses, other type of provision, states are increasingly seeking ways to maintain domestic policy space when engaging in IIAs. As the UNGP recommends, each state is to make its own determination as to how much domestic policy space is needed to achieve its sustainable development goals and to weigh the benefits and risks of each method of maintaining the ability to meet international human rights obligations.[226]

VIII. CONCLUSION

The fact that disagreements are brought to the decision of a third party, such as an ICSID arbitral tribunal, and that a country has offered to do so in a treaty strengthens rather than detracts from a country's endeavor to attract foreign investment and treat investors fairly and equitably.[227]

The tribunal in *MTD v. Chile* asserts that participating in dispute resolution in response to a claim emanating from an IIA can help a nation attract FDI. FDI does play a key role in development and in advancing economic and social rights enumerated in the ICESCR and other human rights treaties. However, the benefits to a state resulting from additional FDI may be outweighed by the negative impact that persistent unintended investor-state claims can have on a country's domestic policy space.

To strike a balance between attracting investment and abrogating policy space, states now seek to implement UNGP Article 9 recommendations into their IIAs through diverse methodology. To accomplish this, some states are choosing to renegotiate existing BITs. Others look to advance new IIAs and regional free trade associations which supersede exiting BITs.

224. *Id.*
225. *Id.* art. 13, Commentary.
226. UNGP, *supra* note 1.
227. MTD Equity, *supra* note 66, ¶ 89.

The interpretation of treatment provisions has been derided as especially invasive of domestic policy space to regulate human rights. The methods available to remedy failures in treatment provisions in traditional IIAs include through the inclusion of preambular language, interpretive provisions, general exceptions provisions, passive provisions, and positive obligations. Some are more widely-accepted and effective than others. The inclusion of direct references to existing human rights treaties and ILO obligations seem to be the most popular. The inclusion of interpretive language relating to FET standard is now universally accepted as fundamental to any IIA. The various methodology for implementing UNGP Article 9 recommendations highlighted herein do not make for a complete or exhaustive list.

There is also a need for capacity building by NGO's, IGO's, state policy makers, and regulatory enforcement departments in regards to assessing the impact of investment on human rights. The lack of resources in developing states to effectively regulate and enforce their human rights obligations exacerbates the issue. To maximize the effectiveness of the UNGP 'policy space' decree in developing states, the UN should provide states with additional resources by engaging in domestic capacity building on rule of law issues. Tribunals can also participate in healing this divide by beginning to take into consideration the respondent state's level of development. Developed nations should consider the differentiated level of responsibility they have towards helping developing nations achieve their policy goals, and should assist as much as possible with policy development in this regard.[228]

It is yet to be seen what effect, if any, progressive IIAs have on encouraging or discouraging FDI inflows, as there is not yet a consistent body of arbitration decisions reliant on them.[229] It is uncertain whether claims which most drastically restrict a state's policy space regarding human rights regulation are less likely to be brought under an IIA with progressive provisions.

Surely, it will be less difficult for developing nations to defend legitimate policy decisions under an agreement which conforms to the UNGP's recommendations; many of the provisions examined herein explicitly protect those legitimate policy decisions. The responsibility then rests on states which adopt the UNGP's recommendations to regulate, administer, and enforce laws which protect their own citizens. Hopefully arbitral tribunals will welcome this new generation of IIAs by more amply considering states' rights to regulate to meet their international human rights obligations in accordance with the intent of the drafters and the UNGP, and uphold the protections which reduce the regulatory chill. If they do, IIAs can be instruments which invite investment without restricting state's policy space regarding human rights regulation. Developing nations with progressive IIA regimes can then begin to reap the benefits resulting from simultaneous increases in human rights regulation and FDI inflows, most

228. *See* G.A. Res. 151/26, Rio Declaration on Environment and Development (Aug. 12, 1992).

229. Spears, *supra* note 25, at 1045.

importantly, an overall increase in the welfare of its citizens through sustainable economic and social development.

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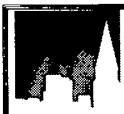

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